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FIRST POINT.

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ANY ALLOWANCE THAT CAN NOW BE MADE HEREIN FOR THE LOSS OF THE *Proteus* CAN ONLY BE FOR A PAYMENT TO THE DIRECTOR GENERAL OF SUCH AN AMOUNT, NOT EXCEEDING THE AMOUNT THUS PAID BY HIM IN SETTLEMENT, AS WILL REPRESENT THE VALUE OF THE *Proteus* 20

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SUPREME COURT OF THE UNITED STATES.

STANDARD OIL COMPANY OF NEW JERSEY, *Petitioner,* *against* SOUTHERN PACIFIC COMPANY and JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, *Respondents.*	October Term, 1924. No. 197

BRIEF FOR THE PETITIONER

STATEMENT.

I. THE RECORD BEFORE THIS COURT.

This cause comes before this Court in pursuance of a writ of certiorari issued on November 12, 1923, *Record,* p. 232, 263 U. S. 696, to review the decree of the United States Circuit Court of Appeals for the Second Circuit in a case arising out of a collision which occurred on August 19, 1918, between the steamship *Cushing,* owned by the petitioner, and the steamship *Proteus,* owned by the Southern Pacific Company, and then in possession of, and being operated by, the Director General of Railroads.

The *Proteus* was a total loss.

Both vessels were held at fault by the District Court, *The Cushing,* 266 Fed. 570.

Before a Commissioner, who was appointed to assess damages, the valuation of the *Proteus* was fixed at the sum of $750,000, plus interest, and this valuation was confirmed by the District Court. *The Cushing,* 285 Fed. 617

The Circuit Court of Appeals affirmed the decree of the District Court in respect to the finding that both vessels were to blame, but modified the decree below by increasing the valuation of the *Proteus* to the sum of $1,225,000 plus interest. *The Cushing,* 292 Fed. 560.

After the term at which the decision of the Circuit Court of Appeals was rendered had expired and further relief from the Courts below was impossible, the counsel for the petitioner first learned that a final settlement had been arrived at between the Southern Pacific Company and the Director General of Railroads, by which a sum had been paid to the Southern Pacific Company in full settlement and discharge of its claim against the Director General of Railroads for the loss of the *Proteus.*

The owner of the *Cushing* applied for a writ of certiorari to this Court on the 22nd day of October, 1923, and in its application stated that in view of the settlement between the Southern Pacific Company and the Director General of Railroads, it would apply to the Court for leave to take new evidence in this Court on

the subject matter of this settlement, in order to be able to deal on the argument with the legal results flowing therefrom.

After the petition for *certiorari* was granted some of the cargo and other claimants who had been awarded recoveries in the limitation proceeding were paid the amount of their damages, and an order entered in this Court severing their claims from the suit, and leaving only the adjustment of the damage for loss of the *Proteus* for determination.

The decision of the Courts below holding both vessels to blame is, therefore, not challenged here.

On April 28, 1924, a motion for leave to take new evidence was made in this Court and an order giving leave to take this evidence was entered here on May 5, 1924.

This motion for leave to take new evidence was strenuously opposed by the counsel for the Southern Pacific Company.

The new evidence was taken during the past summer in pursuance of the terms of the order and has been printed as a second volume of the record on which this case will be argued in this Court.

The case is unusual, if not unique, in the practice followed of taking new evidence in this Court.

The main record which came up from below will, for convenience, be hereinafter referred to as the *Record*,

and the new evidence taken in this Court as the *Commission.*

II. The Procedure below.

a. *Pleadings, Orders and Decisions.*

The steamship *Proteus,* with other floating equipment of the Southern Pacific Company, was taken into the possession and control of the Director General of Railroads on December 28, 1917, in pursuance of war powers granted to the President by the Act of Congress of August 26, 1916, Chap. 418, Par. 1, 39 Stat. 643, and the Proclamation of the President, thereunder, dated December 26, 1917.

The details of this exercise of the power of eminent domain are more fully set forth in *Appendix I* hereof.

At the time of the collision with the *Cushing,* and the sinking of the *Proteus* on August 19, 1918, the *Proteus* was being operated at the expense of the Director General of Railroads. All the navigators of the *Proteus* were employes of the Railroad Administration. *Paragraph Third, Petition of Southern Pacific Company and Walker D. Hines, as Director General of Railroads. Record,* pp. 10-11.

If she had not been lost the *Proteus* would have remained under sole control of the Railroad Administration until March 1, 1920. *Record,* p. 180.

The steamship *Cushing* was owned and operated by the petitioner, Standard Oil Company (New Jersey).

As a result of the collision, petitions for limitation of liability were filed in the United States District Court for the Southern District of New York, on behalf of both vessels.

The Standard Oil Company (New Jersey), as owner of the steamship *Cushing* filed its petition for exemption from or limitation of its liability on March 14, 1919.

The Southern Pacific Company, as owner of the *Proteus,* and Walker D. Hines, as Director General of Railroads, filed a petition also, seeking exemption from or limitation of liability of the *Proteus* on or about July 18, 1919.

The causes were subsequently consolidated under order entered November 23, 1922, and Walker D. Hines was succeeded as a party by James C. Davis, then and now Director General of Railroads.

The trial of the consolidated cases on the merits resulted, as above mentioned, in a decision holding both vessels to blame, and carrying with it a division of the damages between them.

A large number of claims had been filed in the limitation proceedings brought by the Standard Oil Company, and on August 30, 1921, Mr. Edwards H. Childs was appointed Commissioner by the United States District Court to determine and report these damages, as well as the damage sustained by the vessel owners.

The Commissioner separated from the other claims the damages to be awarded on account of the loss of the

Proteus, and filed a separate report thereon, under date of April 21, 1922. The allowance under that report is the only part of the total damages which now forms the subject of review on the writ of certiorari here.

The Commissioner found that the "damages to be awarded to the claimant on account of the loss of the ship (*Proteus*) should be the sum of $750,000, with interest thereon, from August 19, 1918, the date of the loss." *Record,* pp. 190-191.

Exceptions were filed to the Commissioner's findings both by the owner of the *Cushing* and by the Southern Pacific Company.

After argument before Judge Mack, a Circuit Judge sitting by special assignment in the District Court for the Southern District of New York, the Commissioner's report was confirmed, October 17, 1922, and the damage for loss of the *Proteus* was fixed in the sum of $750,000 with interest from the date of the loss. *Record,* pp. 192-196. *The Cushing,* 285 Fed. 617.

On December 19, 1922, a settlement was agreed upon between the Southern Pacific Company and James C. Davis, Director General of Railroads, and payment was made thereunder to the Southern Pacific Company covering *"all claims, rights and demands of every kind and character"* which the Southern Pacific Company then had or thereafter might have or claim against the Director-General arising out of the possession, use and operation of the Southern Pacific Company's properties by the United States while under Federal Control.

This settlement included the claim of the Southern Pacific Company against the Director General of Railroads for loss of the steamship *Proteus*. *Commission*, pages 39, 63 and 64.

Subsequently, on December 27, 1922, the petitioner, Standard Oil Company (New Jersey), appealed from the final decree on the merits.

On January 27, 1923, the Southern Pacific Company also appealed from the decree insofar as the value of the *Proteus* is fixed therein. *Record*, pp. 217-220.

The Director General of Railroads did not take any appeal, and should be held to have acquiesced in the valuation of the Proteus which was fixed by the District Court.

The notice of appeal and the assignments of error filed on behalf of the *Proteus* to the Circuit Court of Appeals for the Second Circuit were made only by *"proctors for claimant, Southern Pacific Company."* *Record*, pp. 218, 219.

It is to be remembered that these appeals were both taken AFTER *the settlement had been reached between the Southern Pacific Company and James C. Davis, Director General of Railroads, as above stated.*

The Standard Oil Company was not aware that any settlement had been made.

The appeals were heard by the Circuit Court of Appeals for the Second Circuit, which rendered an opinion on July 16, 1923, affirming the decree of the District

Court on the merits of the collision—*i. e.*, holding both vessels equally at fault—but modifying the award for the item of damage representing the value of the steamship *Proteus*, by increasing the allowance for her loss from $750,000 to $1,225,000, an increase of $475,000 over the award by the Commissioner, *who saw and heard all the witnesses on this point*, and by Judge Mack who confirmed the Commissioner's Report. *The Cushing*, 292 Fed. 560.

The formal order, modifying the decree below and embodying this decision was entered on July 23, 1923. *Record*, p. 231.

b. *The Commissioner's Findings.*

The hearings on the measure of damage due to the total loss of the *Proteus*, designated as Claim No. 1, began on December 7, 1920, before the Commissioner, Edwards H. Childs, Esq., an experienced lawyer. *Record*, p. 27.

The hearings were not concluded until June 17, 1921. *Record*, pp. 160, 180.

Briefs were subsequently submitted, and the Commissioner did not finally reach his conclusions until April 21, 1922. *Record*, p. 191.

Ten (10) witnesses appeared before the Commissioner during this period and testified at length, five on behalf of the *Proteus* and an equal number on behalf of the *Cushing*.

Six (6) of these witnesses testified particularly as to the "value" of the *Proteus* as of the date of her loss, August 19, 1918.

The Commissioner not only had the opportunity of hearing these witnesses and observing their demeanor under examination by counsel, but, as appears from the record, he interrogated them himself.

As to the two groups of "three experts on each side", he concluded, after considering their testimony, that "the result of such consideration is that the views of the petitioner's witnesses seem to me more nearly in accord with the probabilities in the case at bar than those of claimant's witnesses." *Record*, p. 190. The "petitioner's witnesses" were those who testified on behalf of the Standard Oil Company and the "claimant's witnesses" were those who testified on behalf of the Southern Pacific Company.

The Commissioner discussed the testimony of each witness in a comprehensive report, and summarized his conclusions as follows:

"• • • The market for all such ships" (i. e. American vessels of the class of the *Proteus*) "was closed during the war and in August, 1918, the *Proteus* had no market value." *Record*, p. 183.

• • • • • •

"The claimant" (Southern Pacific Company) "adopted the latter method" (cost of reproduction less depreciation) "and bases its case principally upon the testimony of experts with respect to what, in their opinion, it would have cost to reproduce the *Proteus* in August, 1918, and with respect to the amount that should be deducted from such estimated cost for depreciation during the 18 years that the ship had been in use." *Record*, p. 183.

The petitioner urged that:

"• • • In the absence of a market value no other method should be followed *exclusively* • • •" (Italics ours.) *Record*, p. 184.

• • • • • •

"• • • The claimant's experts think the ship was worth more than twice as much as the petitioner's experts think she was worth and the parties are accordingly more than $600,000 apart in their claims." *Record*, p. 183.

In discussing the reproduction and depreciation theory on which the claimant (Southern Pacific Company) rested its case, the Commissioner found the claimant's (*Proteus'*) method of starting with the replacement value of August, 1918, objectionable, "*because of the fact that the vessel could not have been replaced at that time*". (Italics ours.) *Record*, p. 184.

It was conceded by the claimant's (*Proteus'*) witness called to establish the replacement value that "his company could not have done the work 'because our plant was entirely under the control of the Government as to its output'; and such was the case generally." • • • "The fact that the ship could not have been built for a private owner was due to the war, and it would seem to me, therefore, that if we took those prices as a basis from which to ascertain the value of the ship, we would be adopting a purely artificial standard." *Record*, p. 184.

Also, the Commissioner expressed the view that the claimant (*Proteus*) "erred in failing to give effect to the fact that at the time of the loss the ship was under

requisition," and he stated: "At the time of the loss the claimant was not only unable to sell the ship" (i. e. the *Proteus*) "but was barred by law from using or disposing of her in any way." *Record*, p. 184.

Although the Commissioner heard evidence as to insured values, and also as to the "book value" of the *Proteus*, which had been carried on the claimant's (Southern Pacific Co.'s) books in the sum of $224,986.49, he stated that his conclusions "would not be affected if all such evidence were stricken out"; and, further, that:

> "It is true, of course, that we are not obliged to apply any particular theory and that all of the evidence offered must be considered to ascertain whether on the whole case it is possible to determine the claimant's actual pecuniary loss with any reasonable degree of certainty." *Record*, p. 185.

He also said that he did not feel

> "called upon to adopt any particular theory under which by means of mathematical calculations, a final figure would be produced that should be accepted as exact and conclusive; * * *" *Record*, p. 190.

He concluded by stating:

> "Approaching the question in this way, and considering the whole case, I conclude that the damages to be awarded to the claimant" (*Proteus*) "on account of the loss of the ship should be the sum of $750,000, with interest thereon from August 19, 1918, the date of the loss." *Record*, pp. 190-191.

Thus the Commissioner, in the absence of all possibility of establishing a *"market value,"* refused to accept as conclusive the equally speculative *"reproduction and depreciation"* method of valuation relied on by the claimant—Southern Pacific Company. He properly preferred, after seeing and hearing all the witnesses, to consider all relevant facts established by the evidence and to resolve them into an amount which he deemed to be a fair recompense for the loss of the *Proteus.*

We shall endeavor to show that the Commissioner's method of arriving at the measure of the loss, under the circumstances here, is the only satisfactory way, and that it is supported by the weight of authority.

c. *District Court's confirmation of the Commissioner's Findings.*

The exceptions to the Commissioner's report were argued before Circuit Judge Mack on May 23, 1922, and written briefs were submitted later.

Judge Mack handed down a decision affirming the Commissioner's report on October 17, 1922.

He found that:

> "In August, 1918, practically all American ships of the size and type of the *Proteus* were under requisition, and the market for all such ships was for all substantial purposes closed during the war. * * *" *Record,* p. 192, and;
>
> "* * * while the market price may be the fairest test of the value of standard commodities commonly bought and sold, when the normal con-

ditions of free competition have full play, this test obviously fails not only if there is no market but when the conditions which make the test a proper one do not obtain. * * *" *Record,* p. 193; and,

"* * * It is not necessary to consider here what would be fair value under the circumstances between private litigants if the steamship *Proteus* had not been under requisition. The *Proteus* was under requisition and the ascertainment of her value must be predicated on that fact. * * *" *Record,* p. 193, and;

"* * * If evidence is adduced, indicating that the market price is not fair under the circumstances, then all other relevant facts should likewise be considered in determining fair value, unless indeed some positive form for ascertaining value is established by legislation. Cf. the Rate Regulation Cases; Minnesota Rate Cases, 230 U. S. 352, 434." * * * *"All the relevant facts should be considered.* * * *" *Record,* p. 193.

Judge Mack then discussed all the factors entering into a determination of the ascertainment of a "fair value" for the *Proteus* at the time of her loss, and an adequate compensation to the owner, including the reproduction and depreciation theory on which the claimant rested its claim, and arrived at the conclusion that "the result reached by the Commissioner would seem to afford full and ample compensation", and confirmed the amount as fixed by the Commissioner, namely, $750,000 with interest from the date of the loss. *Record,* p. 196.

d. *The Rule of Valuation adopted and applied by the Circuit Court of Appeals for the Second Circuit.*

The appeal to the Circuit Court of Appeals for the Second Circuit involved both the merits of the collision and the award of damages for loss of the *Proteus*.

That Court affirmed the District Court's findings on the merits, but increased the award for loss of the *Proteus* to the sum of $1,225,000, plus interest from the date of the loss, in its opinion dated July 16, 1923. *Record*, pp. 222-230. Thus the Circuit Court of Appeals made an additional allowance in the sum of $475,000 plus interest on that amount, or 63⅓% more than the amount which the Commissioner and Circuit Judge Mack had awarded.

Necessarily, such a wide diversity as is shown by these amounts indicates the application of an equally divergent view as to the method of arriving at valuation under the circumstances existing in this case.

The Circuit Court of Appeals rested its decision squarely on the rule of "*cost of production less depreciation*", stating, at page 229 of the *Record*:

> "Assuming, as claimed, there was no market value in August, 1918, because such steamships could not be purchased because none were on the market or because it was difficult, if not impossible, to obtain a shipbuilder to construct one, then these special circumstances invoke the rule of damages of cost of production less depreciation."

[The Court evidently meant *re*production or *present* cost of production, not original cost.]

The Court then fixed the value in the sum of $1,225,000, obviously by adopting *in toto* the formula applied by one of the witnesses for the *Proteus* interests. *Record*, p. 230. That witnesses's formula is expressed in an answer to one question as follows:

> "Q. Mr. Martin, how did you get at this value of $1,225,000? What does it represent?
>
> "A. There being no sales to guide me, I took the estimated cost of the reproducing a vessel of the same size and description as the *Proteus* in August, 1918; and the estimated cost was $1,750,000. From that cost I deducted 2½% for 18 years' depreciation, which is $525,000, leaving a value of *$1,225,000." *Record*, p. 31.

We shall show hereinafter that Mr. Martin's arithmetic was erroneous, to the very substantial disadvantage of the petitioner, in that an error in his calculations increased greatly the amount finally fixed. The Circuit Court of Appeals carried over this same error in mathematics.

But the objection to the ruling of the Circuit Court of Appeals is more substantial than its miscalculations, and is directed to its application for the ascertainment of the *Proteus'* value of an arbitrary formula, which is made up of two factors—"reproduction" cost, and per-

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*The figure is erroneously printed in the Record as $1,235,000. It appears in the original record correctly as $1,225,000.

centage of "depreciation",—both of which are obviously entirely speculative and impossible of definite determination.

In short, although the Commissioner and the District Court considered and weighed the high cost of production prevailing at the time, and used this as one element together with all other relevant facts bearing on the value of the *Proteus;* the Circuit Court of Appeals either entirely disregarded or did not give weight to any other evidence as to value than that of reproduction cost, and rested its decision squarely on that one method of reaching a figure to represent the loss.

III. The petitioner's contentions.

a. *On the Record which has been sent up on Certiorari.*

The petitioner's contention is that while evidence of appreciation in ship's values may be admissible, and is to be considered as one of the factors, yet, inasmuch as the *Proteus* could not have been reproduced at the time, there is not any more reason for adopting a fictitious "*reproduction cost*" as a controlling factor than there would be for adopting a fictitious "*market value.*"

Under the circumstances existing at the time of loss *all elements* bearing on the value of the *Proteus* should have been considered and weighed, and a figure determined therefrom which the exercise of a fair and reasonable judgment would fix as the measure of the damage.

This latter is the standard adopted by the Commissioner and the District Court.

The rule adopted by the Circuit Court of Appeals, however, was to apply an arbitrary formula composed of two wholly speculative factors.

The theory of the Circuit Court of Appeals is open to just the same objections as the market value theory under the circumstances of this case. There was not any market for vessels. There was not any possibility of building a vessel except for the Government.

So *"market price"* and *"reproduction cost"* were both in the same category of purely imaginary figures.

b. *On the new testimony taken in this Court.*

The Petitioner's contentions on this branch of the case are that on the evidence which has been taken in this Court the true relations of the parties is made much clearer than it was in the Courts below, and that the evidence regarding the settlement has eliminated the Southern Pacific Company's claim for the loss of the *Proteus* from the case.

The relations of the parties are as follows:

The Director General, by the President's exercise of his war powers, was in the position of a hiring bailee in possession—the equivalent of a demise charterer, of the *Proteus*.

The Southern Pacific Company as owner of the *Proteus* had nothing whatever to do with her navigation.

It merely had a right to have the *Proteus* safely returned when the Railroad Administration was at an end or to be recompensed in the event of her loss.

The Southern Pacific Company was not liable *in personam,* for it did not employ the persons who were navigating the *Proteus.* It could not be held indirectly liable, at that time, by arrest of the *Proteus* because she was immune from process whilst she was in the Director-General's possession.

The Southern Pacific Company, therefore, had a claim in tort against the Director General and against the *Cushing* and her owner, for the loss of the *Proteus,* which has been found to have been due to the concurrent negligence of the Standard Oil Company (*Cushing*) and the Director General of Railroads (*Proteus*). The Southern Pacific Company also, it is true, had a contract indemnity from the Director General as bailee.

It has now been shown by the new evidence, taken in this Court, that the Southern Pacific Company has settled the Director General's liability in all respects by receiving a money payment approximately on the basis of the District Court valuation, in exchange for a full release without reservations of claims against the *Cushing* or its owner, the Standard Oil Company, or anyone else.

The legal result of the proof of this transaction, which has now with great effort been dragged from the respondents, is that:

(1) The Southern Pacific Company has had satisfaction for the loss of the *Proteus* and cannot seek double or further satisfaction against the Standard Oil Company; and

(2) The Director General, having settled with his bailor, the Southern Pacific Company, would be made whole by an allowance in the collision adjustment of the amount which he paid to his bailor, and is certainly not entitled to more; for his loss on this record is limited at least to his liability to his bailor.

Actually he should not recover quite as much as he paid his bailor, for the Court should find that he paid his bailor a higher amount than the proper valuation of the *Proteus in which he should be held to have acquiesced by not appealing from the decree of the District Court.*

IV. Questions for submission to this Court.

The case involves two points, therefore, for review by this Court:

First: Has the claim for the loss of the *Proteus* been extinguished, or has the amount of the damage recoverable therefor been fixed, by the settlement made under the circumstances herein shown?

Second: By what method shall the value of a vessel, which has been totally lost, be determined in a situation in which it is impossible to prove that at the time of her loss there was a market value either for her sale or for her reproduction?

We shall present the arguments in support of our contentions in that order.

FIRST POINT.

THE SETTLEMENT MADE BETWEEN THE DIRECTOR GENERAL OF RAILROADS AND THE SOUTHERN PACIFIC COMPANY, BY PAYMENT TO THE LATTER OF THE VALUE OF THE *Proteus* IN EXCHANGE FOR A RELEASE, CONSTITUTED A SATISFACTION OF THE CLAIM OF THE SOUTHERN PACIFIC COMPANY IN RESPECT OF THE LOSS OF THE *Proteus*, AND NECESSITATES A REVERSAL OF THE DECREE BELOW AND A DISMISSAL OF THE CLAIM OF THE SOUTHERN PACIFIC COMPANY FOR DAMAGES IN RESPECT OF THE LOSS OF THE *Proteus*.

ANY ALLOWANCE THAT CAN NOW BE MADE HEREIN FOR THE LOSS OF THE *Proteus* CAN ONLY BE FOR A PAYMENT TO THE DIRECTOR GENERAL OF SUCH AN AMOUNT, NOT EXCEEDING THE AMOUNT THUS PAID BY HIM IN SETTLEMENT, AS WILL REPRESENT THE VALUE OF THE *Proteus*.

I. The process of eminent domain by which the United States took possession and control of the Railroad and Water Systems of Transportation has been detailed, so far as relevant to this case, in *Appendix I* hereof.

This Court has summarized the situation as to liability on the part of the railroad companies which were thus dispossessed in *Missouri Pacific Railroad* v. *Ault*, 256 U. S. 554 (1921), at page 557, as follows:

> "The company is clearly not answerable in the present action if the ordinary principles of common law liability are to be applied. The Railroad

Administration established by the President in December, 1917, did not exercise its control through supervision of the owner-companies, but by means of a Director General through 'one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing.' *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135, 148. This authority was confirmed by the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and the ensuing Proclamation of March 29, 1918, 40 stat. 1763. By the establishment of the Railroad Administration and subsequent orders of the Director General, the carrier companies were completely separated from the control and management of their systems. Managing officials were 'required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.' U. S. R. R. Adm., Bulletin No. 4, pp. 113, 114, 313. The railway employees were under its direction and were in no way controlled by their former employers. See Bulletin No. 4, p. 168, Sec. 5; 198 *et seq.*; 330 *et seq.* It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner-companies as their interest in and control over the systems were completely suspended."

Among the properties of the Southern Pacific Railroad Company taken over under the laws and proclamations above referred to was the Steamship *Proteus. Commission,* p. 15.

In pursuance of the provisions of the Federal control act of March 21, 1918, and the proclamation of the President of March 29, 1918, a contract was entered into on February 19, 1919, between the Director General of Railroads and the Southern Pacific Company and its subsidiaries, whereby a period of Federal control was fixed as beginning from 12 o'clock midnight, December 31, 1917, *Commission*, p. 14, and whereby provisions were made for the compensation of the Southern Pacific Company and for indemnity against any losses which might occur whilst the railroad and its steamships were in possession of the Director General. *Commission*, pp. 9 to 36.

All the possibly relevant provisions of this contract have been printed as *Appendix II* of this brief.

This agreement among other provisions contained the following (italics ours).

> "If, during Federal control, any of the property described in Paragraph (A) of Section 2 hereof * * * is destroyed or damaged by fire or *marine casualty*, or any of the floating equipment described in paragraph (A) of Section 2 hereof is destroyed or damaged by war risks while in ocean waters outside of the three mile limit, *and is not restored or replaced by the Director General, he shall reimburse the companies the value of the property destroyed or the amount of the damage at the time of the loss;* * * *
>
> * * * * * *
>
> *"The words 'Marine casualty' are used herein as applying to floating equipment and as meaning*

casualties, covered by the usual marine insurance policy, including collision clause, and losses or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosion, bursting of boilers or breakage of shafts or through carrying explosives."

Agreement; Commission pp. 26, 27.

In Section 2, Paragraph A, of the agreement, the *Proteus* and other ocean steamships of the Southern Pacific Company's fleet which were taken by the Director General, were mentioned by name. *Commission,* p. 15.

II. In the early morning of August 19, 1918, whilst thus in the possession and control of and being manned, victualled and operated by the Director General of Railroads, the *Proteus* came into collision with the Standard Oil Company's Steamship *Cushing* at a point about thirty miles below Diamond Shoal Gas Buoy off the South Atlantic Coast. *Opinion of Circuit Court of Appeals, Record* p. 223.

As a result of this collision, the *Proteus* was sunk, and for it the *Proteus* and the *Cushing* were held jointly to blame. *Opinions below, Record,* pp. 18-24, 222-230.

III. After the loss of the *Proteus* in the collision with the *Cushing,* and on December 17, 1919, Mr. Lewis J. Spence, Director of Traffic of the Southern Pacific Company, wrote from its executive offices, 165 Broadway, to Mr. E. R. Richardson, Federal Manager Coastwise Steamship Lines, Pier 49, North River, the following letter:

"Dear Sir: As you are aware, the steamship *'Proteus'* was sunk in collision with a Standard Oil tank steamer off Cape Hatteras on August 19, 1918. Under the contract between the Director General of Railroads and the Southern Pacific Company the former is responsible to the Company for the value of the property destroyed at the time of the loss, in the event the vessel is not restored or replaced by the Director General. I suggest it would be well for representatives of the Director General and of the Company to endeavor now to fix the amount of the liability in the premises of the Director General. I should like to have your views on the subject, and am ready on behalf of the Company to take the matter up with you at any time with a view to arriving at an amicable agreement."

Commission, p. 37.

To which letter, after due time, under date of February 18, 1920, Mr. Richardson replied as follows:

"Dear Sir: I regret delay in replying to your letter of December 17th, regarding the SS. *'Proteus'*, which was sunk in a collision with a Standard Oil tank steamer off Cape Hatteras on August 19, 1918. You then expressed the desire that representatives of the Director-General and the Company endeavor to fix the amount of liability of the Director-General.

"Since receipt of your letter we have been continuously pressing Mr. E. Marvin Underwood, General Counsel of the U. S. Railroad Administration, for some advices along the lines of your suggestion, and we are just in receipt of a tele-

gram from him dated February 17th, reading as follows:

"'Your wire tenth, reference valuation steamship *Proteus*. Do not think practicable to arrive at valuation of steamer before termination Federal control. Period. Matter being considered here and arrangements for valuation will be made at early date.'"

Commission, p. 38.

With the exception of these two letters all negotiations leading up to the settlement hereinafter described are said by the witnesses examined under the Commission issued by this Court, to have been oral.

These oral negotiations are best described by Mr. Davis, present Director General of Railroads, in his answers to the interrogatories.

Mr. Davis says that he was appointed Director General of Railroads on March 28, 1921, and that as such is the Agent of the President in liquidating liabilities of the Government growing out of and connected with Federal control. *Commission*, p. 62.

Then, after putting in evidence the agreement between the Director General and the Southern Pacific Company of February 19, 1919, and stating that there were oral negotiations, he described these negotiations with regard to the loss of the *Proteus* as follows:

"The final settlement with the Southern Pacific Company was the subject of investigation for several months prior to December 19th, 1922. This settlement involved a claim on the part of the

Southern Pacific Company, growing out of the use and operation of its property during the period of Federal control, which aggregated $54,252,694.57, and included in this claim was the claim for the loss of the Steamship *Proteus.* The negotiations leading up to the final settlement were conducted solely by the Director General and his staff. The staff was composed of the late E. M. Alvord, Director Division Liquidation of Claims; Alex. W. Smith, Special Counsel; L. J. Tracy, Comptroller and D. C. Porteous, Director Division on Finance. The negotiations leading to a final settlement covered a number of meetings and conferences from perhaps the 20th of November to the date of the final settlement, December 19th, 1922.

"The Southern Pacific was represented by a number of its managing officers, including A. D. McDonald, its Vice-President and Controller, and J. P. Blair, General Counsel; and before the final adjustment was agreed upon, Mr. Kruttschnitt, Chairman of the Executive Board, appeared before the staff.

* * * * * *

"*Ninth* [Interrogatory]. If you state that there were negotiations had, as asked in the Fifth, Sixth, Seventh and Eighth Interrogatories, will you state whether, as a result of those negotiations, there was any agreement reached as to the amount which should be paid by the Railroad Administration to the Southern Pacific Company for the loss of the *Proteus?*

"*In answer to the ninth interrogatory he saith:* Included in the property of the Southern Pacific Company taken over by the Government

were the Steamship *Proteus* and other property owned and operated by the railroad known as the Atlantic Steamship Lines. A list of the property and ships included in the Atlantic Steamship Lines property taken over is found in Section 2 of the standard contract, copy of which is attached to the answer to Interrogatory 4. During Federal control the Lighter *Confidence* and the Steamship *Proteus* were sunk. In this connection, there were claims made by the Southern Pacific Company for under maintenance of the floating equipment and property taken over by the Government as part of the Atlantic Steamship Lines, and claims for excess maintenance against the Company by the Government on account of this property. On or about the 20th of November, 1922, a conference was had between Mr. Frank C. Wright and other representatives of the Railroad Administration (Mr. Wright represented the Railroad Administration in admiralty matters) and Mr. A. D. McDonald, Vice-President and Controller of the Southern Pacific Company, and other representatives of the Company. This conference was for the purpose of enabling Mr. Wright to recommend to the Director General and his Staff his view of a fair adjustment of the disputed items in the claim of the Southern Pacific Company covering the destruction of the Barge *Confidence,* the loss of the Steamship *Proteus,* and the disputed items of over and under maintenance. As a result of this conference, Mr. Wright recommended to the Director General and his Staff the following adjustment of the items above referred to:

"Allowance to the Company for undermaintenance of terminals, $20,000.00. Allowance to the

Director General for excess maintenance of floating equipment, $235,000.00. This was a net allowance to the Railroad Administration of $215,000.00 excess maintenance.

"It was further recommended that the Railroad Administration allow the Company for the value of the Steamship *Proteus* and the Lighter *Confidence* a lump sum of $885,000.00. It is perhaps fair to state that the amount claimed for the loss of the Lighter *Confidence* was $16,664.00.

"As a result of these various credits and debits, it was recommended by Mr. Wright that the Director General allow the Southern Pacific Company the sum of $670,000.00. This recommendation made by Mr. Wright was for the purpose of assisting the Director General and his staff in concluding a final adjustment of all the claims which the Southern Pacific Company was making against the Government for the use of its property during the period of Federal control.

"*Tenth* [Interrogatory]. If you answer the Ninth Interrogatory in the affirmative, will you please state when such an agreement was reached and what amount the Director General of Railroads agreed to pay to the Southern Pacific Company for the loss of the *Proteus.*

"*In answer to the tenth interrogatory he saith:* A final adjustment was made with the Southern Pacific Company on the 19th of December, 1922, in which the Director General of Railroads agreed to pay and did pay to the Southern Pacific Company the sum of $9,250,000.00 in cash. This was a lump sum adjustment of the entire claim made by the Southern Pacific Company, which aggregated $54,252,694.57."

Commission, pp. 62, 63, 64.

As a result of these negotiations a written agreement of final settlement was entered into on the 19th day of December, 1922.

In commenting on this agreement of settlement and after stating that there was not any other agreement than that which was marked in evidence, as Exhibit B, *Commission,* p. 96, Mr. Davis dealt, in answering the Fourteenth and certain other Interrogatories, with the question whether there was any item in the settlement representing the amount to be paid for the loss of the *Proteus* as follows, *Commission,* pp. 65, 66:

> "The Director General of Railroads, in concluding settlements with the respective carriers whose property was taken over by the Government and operated during the period of Federal control, made no itemized statement showing the amounts that were paid on each item in dispute, which was in anywise communicated to the Company making such settlement, but all of the settlements were what are known as lump sum, in which all items in dispute were included in the final amount offered.
>
> "It is only fair to say, however, that in making each of these settlements the Railroad Administration kept a record, which was exclusively for the use of the Railroad Administration, and was not in anywise communicated to the carriers, showing how the lump sum settlement was finally arrived at, and in the records of the Railroad Administration there appear the items showing how this lump sum was arrived at in making the adjustment with the Southern Pacific Company.

"The Company claimed for the loss of the Steamship *Proteus* $1,268,090.26, and for the loss of the Barge *Confidence* $16,663.80 and, in arriving at the lump sum, the Railroad Administration made an allocation and apportionment on these two items of $885,000.00.

"It is perhaps only fair to state that this allocation and apportionment were made in connection with the adjustment of very many items in dispute, covering an aggregate claim in excess of $54,000,000.00, and no definite agreement as to specific items was made with the Company at the time of the final adjustment."

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"*Seventeenth.* [Interrogatory.] If in answer to the Ninth and Tenth Interrogatories and/or the Fourteenth and Fifteenth Interrogatories, you have stated an amount agreed to be made as a payment for the loss of the *Proteus*,

"(a) State whether or not in arriving at that amount you took into consideration the value of the *Proteus* which had been fixed by the Commissioner and by the United States District Court for the Southern District of New York in this litigation?

"(b) If you did not take into consideration the value of the *Proteus* fixed by the Commissioner and the said United States District Court in this case, will you state on what you based the amount to be paid by the Director General of Railroads to the Southern Pacific Company for the loss of the *Proteus*.

"*In answer to the seventeenth interrogatory he saith*: A. The Director General and his Staff

and also Mr. Wright had knowledge of the allowance made by the United States District Court in this litigation, and that was one of the matters considered in making the adjustment, but I cannot say that it was controlling.

"B. There was a very careful examination, from all available sources, made as to the actual value of the *Proteus* at the time of its loss, and while, as heretofore stated, the finding of the court was one of the items which influenced the result the final result was obtained from all sources of information available to the Director General.

"*Eighteenth* [Interrogatory.] Was the agreed amount to be paid for the loss of the *Proteus* ever paid by the Director General of Railroads to the Southern Pacific Company?

"*In answer to the eighteenth interrogatory he saith*: The only payment made to the Southern Pacific Company was the final payment made in accordance with the agreement of final settlement, copy of which is hereto attached.

"*Nineteenth.* [Interrogatory.] If you answer the Eighteenth Interrogatory in the affirmative, will you state the date of this payment, the total amount thereof, and the person to whom it was made?

"*In answer to the nineteenth interrogatory, he saith*: The total amount of the payment was $9,250,000.00, and it was made by check issued by the Railroad Administration and payable to the Southern Pacific Company."

Commission, pp. 65, 66.

The final settlement agreement acknowledges the receipt of $9,250,000,

"* * * in full satisfaction and discharge of *all claims, rights and demands, of every kind and character, which the said Companies, or any of them, now have or hereafter may have or claim against the Director General,* or any one representing or claiming to represent the Director General, *the United States, or the President, growing out of or connected with the possession, use, and operation of the Companies' property by the United States during the period of Federal control, or out of the contract between the parties dated the 19th day of February, 1919;* and the said Companies, both jointly and severally, hereby acknowledge the return to and receipt by them of all their property and rights which they are entitled to, and *further acknowledge that the Director General has fully and completely complied with and satisfied all obligations on his part, or on the part of the United States, or the United States Railroad Administration, growing out of Federal control.*" (Italics ours.)

Commission, p. 97.

The reservations contained in the final settlement agreement do not affect the situation in this case in any way. *Exhibit B, Commission,* p. 98.

They merely deal with the obligation of the Director General under the contract of February 19, 1919, to hold the companies harmless against certain claims.—*Contract, Sec. 4, Subdivisions i and j, Commission,* pp. 82-83—and the appropriate complementary right of the Director General to object to settlement of such claims by the Railroad Company in spite of the fact that after

Federal Control the companies' own legal force was to be employed in respect of such claims. *Contract, Section 9, Subdivision f, Commission,* p. 94.

The settlement of the obligation of the Director General under Section 5, Subdivision E, of the contract, *Commission,* p. 86, hereinabove quoted to restore or replace any property damaged by marine casualty, or to reimburse the companies the value of the property destroyed or the amount of the damage at the time of the loss, applied to damage to and loss of the companies' own property, not to claims *against* the companies, and was satisfied in full by the lump sum payment which included the amount allowed by the Director General in respect of the loss of the *Proteus,* and of the loss of the Barge *Confidence* referred to in the Director General's evidence. *Davis, 14th interrogatory, Commission,* p. 65.

The attitude of the witnesses from the Southern Pacific Company, in answering the interrogatories addressed to them was largely indifferent.

They admitted the settlement, they admitted the exchange of letters between Mr. Spence and Mr. Richardson, they stated that the negotiations were otherwise oral only, but they apparently sedulously avoided a detailed discussion of the Railroad's claim for $54,252,694.57, for which they accepted, as accord and satisfaction, in full settlement the sum of $9,250,000. *Commission,* Evidence of Southern Pacific Company witnesses, —*Kruttschnitt,* pp. 3-8; *Van Deventer,* pp. 41-46; *Neill,* pp. 46-51; *Jungen,* pp. 51-56.

It is significant that there were not any cross-interrogatories addressed to the witnesses by the counsel for the *Proteus*.

IV. The circumstances owing to which it became necessary to take new testimony in this Court are an integral part of the story of this unusual case.

They were as follows:

After the decision holding both vessels to blame in the District Court the cases were sent to a Commissioner to assess the damages.

Here the Director General was guilty of a strange omission. He was not represented by separate counsel on this reference.

Certainly just so soon as the *value* of the *Proteus* came to be proved the interests of the Director General and the Southern Pacific Company diverged, even if, prior to that time, they could have been considered to have been identic.

A single representation of two divergent interests was the subject of criticism by this Court on a very complicated state of facts in the case of *The Beaconsfield*, 158 U. S. 303; and it was there intimated that when a party by reason of representing two interests comes to a point where he occupies an inconsistent position it is his duty to call that fact to the Court's attention. 158 U. S. 309, 310.

The fact that the Director-General was not represented on the record before the commissioner was called to the attention of the counsel for the Southern Pacific

Company by counsel for the Standard Oil Company during the reference. Counsel for the Southern Pacific Company, however, insisted that he represented them both, the Director General and the Southern Pacific Company.*

Thus there was no separate counsel guarding the rights of the Director General, when counsel for the Southern Pacific Company sought on the reference to make the valuation of the *Proteus* as high as possible.

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* During the examination of Mr. Frank S. Martin, one of the witnesses for the Southern Pacific Company, before the Commissioner this colloquy was had.

"The Commissioner: The *Proteus* was a freight boat?

The Witness: The *Proteus* was a freight and passenger boat.

(Fol. 544) Q. Do you know whether or not there has been any settlement as between the Government and the owners of the *Proteus* of the loss of the *Proteus*?

A. No, sir, I do not.

Mr. Burlingham. I will answer for the record, there has been none.

Q. You said you were adjusting values?

A. Not of that one, I did not.

Q. The *Proteus* was in the Railroad Administration, was she not?

A. Yes, the *Proteus* was.

Mr. McGrann: I may say on the record here that the Director General of Railroads is a party to the proceedings of limitation of the *Proteus*.

The Commissioner: And a party to this proceeding now pending here?

Mr. McGrann: A party to the limitation of the liability of of the *Proteus*.

Mr. Burlingham: Yes, the libel was filed, Mr. Commissioner, by the Railroad Administration and the Southern Pacific Company against the *Cushing*. They both join in the libel.

The Commissioner: Were they served with notice of this hearing?

Mr. Burlingham: I represent them." *Record* p. 35.

This was before the settlement and success in this endeavor would have meant that the Railroad Administration would have had to pay an increased amount as the value of the *Proteus* under it contract, without any recourse over, in case the decree as to fault was modified on appeal by holding the *Proteus* solely to blame.

Obviously, it was to the interest of the Director General, not then knowing whether the final result of the litigation would be favorable or unfavorable to him, to have had the value of the *Proteus* fixed at the lowest possible amount.

On November 28, 1922, after the Commissioner's findings had been excepted to and confirmed by the District Court, a final decree was entered in the District Court, holding both vessels to blame and fixing the value of the *Proteus* at $750,000. *Record*, pp. 197 to 216.

On December 19, 1922, the settlement between the Southern Pacific Company and the Director General was made. Of this the Standard Oil Company and its counsel were not aware until after the term of the Circuit Court of Appeals had expired many months later. *Davis, Commission*, p. 64.

On December 27, 1922, an appeal was taken by the Standard Oil Company from the decree of the District Court. *Record*, p. 217.

On January 27, 1923, the Southern Pacific Company appealed against the valuation of the *Proteus*. *Record*, p. 219.

There was not any appeal taken by the Director General although he was a party to the case, and liable for the negligence of his servants who were operating the *Proteus*.

The formal decree and judgment of the Circuit Court of Appeals, whereby the decision below was affirmed on the merits and the valuation of the *Proteus* as of August 19, 1918, the date of her loss, was increased from $750,000 to $1,225,000, was entered on July 23, 1923. *Record*, p. 231.

Thus the settlement between the Southern Pacific Company and the Railroad Administration was made *between* the time of the final decree of the District Court in November, 1922, and the final decree of the Circuit Court of Appeals in July, 1923.

It seemed curious at that time to counsel for the *Standard Oil Company* and the *Cushing*, who were unaware of this settlement, that the Director General did not appeal on behalf of the Railroad Administration from the District Court decree.

The Director General may have been under the impression that he had finished with the case entirely after he had settled his liabilities to the Southern Pacific Company for the loss of the *Proteus*, for an amount apparently somewhat in excess of the valuation found in the decision of the District Court.

Of course, it was not true, that the Director General could, at this stage of an Admiralty case, commence to disregard the proceedings, because on the appeal to the Circuit Court of Appeals there would be a new trial in that Court.

In that new trial there might very possibly have been, and, indeed, according to the contention of the Standard Oil Company, there should have been, a modification of the decree below, by which the Standard Oil Company would have been exonerated from all liability, and the Director General would have been held solely to blame for all the damages caused by the collision and would have been liable to the Southern Pacific Company for the increased award in respect of the *Proteus*.

It is to be remembered that the Southern Pacific Company had been paid in full for the loss of the *Proteus* by the Railroad Administration before it took its appeal which was pointed solely to the valuation fixed for the *Proteus for which they had already been paid. Notice of Appeal by Southern Pacific Company and its Assignments of Error.** *Record*, pp. 218, 219.

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* The Notice of Appeal on behalf of the Southern Pacific Company and its assignment of errors were as follows:

"NOTICE OF APPEAL.

"Sirs: Take notice that the claimant, Southern Pacific Company, hereby appeals to the United States Circuit Court of Appeals for the Second District, from the final decree entered herein November 28, 1922, in so far as said decree fixes the value of

The Southern Pacific Company was not liable for the collision because the *Proteus* was out of its possession and control, and the negligence for which she was condemned was negligence of the Director General's employees for which the Southern Pacific Company was not even remotely liable.

By not appealing, the Director General, thus, acquiesced in the finding of the District Court both as to value and liability.

It is confidently submitted, that, as he has not challenged the District Court's decision, the Director General cannot recover more than that decision allowed for the value of the *Proteus*. Cf. *The Beaconsfield*, 158 U. S. 303, 310.

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the SS. *Proteus* as of August 19, 1918, at the sum of $750,000.

"Dated, New York, January 27, 1923.

"Yours, etc., Burlingham, Veeder, Masten & Fearey,
Proctors for Claimant Southern Pacific Company."

Record p. 218.

"ASSIGNMENTS OF ERROR.

"Southern Pacific Company, claimant herein, hereby assigns error in the decision and decrees of this court in so far as they relate to the valuation of the *SS. Proteus*, as follows:

"1. In that the Court overruled claimant's exceptions to the report of the Commissioner filed herein April 22, 1922.

"2. In that the Court found the value of the *SS. Proteus* as of August 19, 1918, to have been $750,000.

"3. In that the Court did not fix the value of the *SS. Proteus* as of August 19, 1918, at the sum of $1,225,000 as established by the preponderance of the evidence.

"BURLINGHAM, VEEDER, MASTEN & FEAREY,
Proctors for Claimant Southern Pacific Company."

Record p. 219.

If he paid more to the Southern Pacific Company, he should be out of pocket the difference.

Thus the Director General took a risk, which was rather unusual for a Government Officer, both in not appealing on the merits, and in making the settlement between the decree of the District Court and the expiration of the time of the opposing party to appeal therefrom. It was only a bit of good fortune for him in this particular case that the decree was affirmed so far as his liability was concerned.

Apparently it is the fact that the Director General did not have a representation separate from the Southern Pacific Company which has led to the necessity of asking this Court for leave to take testimony here, and has resulted in the curious situation developed by the testimony taken. Cf. *The Beaconsfield,* 158 U. S. 303, at 309-310.

Whatever may have been his reason for lack of active interest in the case since the District Court decision, the Director General has now come into it again in this Court, still represented by the same counsel as the Southern Pacific Company.

V. In his brief in opposition to the motion to take new evidence in this Court, counsel for the Southern Pacific Company seemed to contend that the fact that the Federal Government took possession of the Railroads in exercising its right of eminent domain in some way changed the legal results of such a possession.

It is obvious that the *process* followed in securing possession did not make any difference in the legal results involved in the possession.

The exercise of eminent domain under War Powers by the President in seizing the railroads in pursuance of the Acts of Congress was, in effect, a summary proceeding in condemnation, with a provision that possession only should be taken and that just compensation should be subsequently arranged.

As it was only a taking of possession, not a taking of title, the legal situation resulting was not in any way different from the situation which would have existed if possession had been taken in pursuance of a contract voluntarily made by the railroads.

The resultant legal situation was this:

The Southern Pacific Company after the taking by the Government had no control whatever over the *Proteus,* no personal liability for the acts of those navigating her, and no interest in her except the interest which the owner of any vessel has when she is under a charter of demise; i. e., as owner, it was entitled to a compensation for her use and an indemnity in case of her being lost.

The Railroad Administration, whilst in possession of the steamship *Proteus,* was a hiring bailee in the position of a demise charterer who has assumed the duty of manning, provisioning, victualling and operating a vessel.

Indeed, the Railroad Administration took the position on the pleadings that it was, in effect, a demise charterer, and as such entitled to limit liability, as will be hereinafter noted in greater detail. *Joint petition of Southern Pacific Company and Director General, Article 3. Record,* pp. 10, 11.

When dealing with a charter of demise, this court said in *The Barnstable,* 181 U. S. 464 (1900) at page 468:

> "As the charterers hired the *Barnstable* for a definite period, and agreed to select their own officers and crew, and pay all the running current expenses of the vessel, including the expense of loading and discharging cargoes—the owners only assuming to deliver the vessel to the charterers in good order and condition, and to maintain her in an efficient state during the existence of the charter party, there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from any lien of their own contracting, or caused by their own fault. *Thorp* v. *Hammond,* 12 Wall. 408; *Williams* v. *Hays,* 143 N. Y. 442; *Scott* v. *Scott,* 2 Starkie 386; *Webster* v. *Disharoom,* 64 Fed. Rep. 143; *Galzoni* v. *Tyler,* 64 Cal. 334, 386.
>
> "This, indeed, is but the application to charter parties of the ordinary law of bailment, which requires that the bailee return the property to the owner in the condition in which it was received,

> less the ordinary results of wear and tear, and such injuries as are caused by a peril of the sea, or inevitable accident. *Coupe Co.* v. *Maddick,* (1891) 2 Q. B. 413; *Sturm* v. *Boker,* 150 U. S. 312; Story on Bailments, secs. 25 to 32."

Under a demise charter, as was held in the case just cited, it is the charterer, as the employer of the persons who operate the vessel, that is responsible for a collision caused by the negligence of such persons.

As is above noted, the Southern Pacific Company, itself was not the employer of the master and officers of the *Proteus,* whose negligence contributed to the collision, and would not have been personally liable in any way whatsoever to the Standard Oil Company.

Furthermore it could not have been held liable even indirectly by direct suit against, and the arrest of the *Proteus* because a proceeding *in rem* was forbidden by the terms of the President's Proclamation and by Section 10 of the Federal Control Act. Hence it is doubtful whether it really needed to file any limitation of liability petition, for as mere owner of the *Proteus* it was not even threatened under the existing circumstances.

A further aspect of the legal situation is that the Southern Pacific Company, as the owner of the *Proteus,* had at the commencement of the action, a right to recover the value of the *Proteus* not only from the Standard Oil Company but also from the Director General, whose

concurrent negligence had caused her loss. *Clark* v. *United States*, 95 U. S. 539; *Sun Printing & Pub. Ass.* v. *Moore*, 183 U. S. 642.

It is true that in connection with its relation to the Railroad Administration the Southern Pacific Company did not have to rely solely on its tort action, because by contract the Director General had agreed to replace or pay for any vessel that was lost by collision. But that does not alter the fact that the Southern Pacific Company could have joined the Standard Oil Company and the Director General as respondents in a collision suit if it had elected to follow that procedure.

In the *evidence taken in this Court* it is now shown that the bailor-owner, the Southern Pacific Company, has settled with the bailee-charterer—the Director General—and has received satisfaction for and given release in respect of damages suffered by it owing to the loss of the *Proteus*.

That release did not contain any reservation of rights against the Standard Oil Company or other parties, and, therefore, under well settled principles the Southern Pacific Company, having received satisfaction for the loss it suffered, has had its claim extinguished as against all the world, and is barred from seeking any further recovery of any kind from any body. Its cause of action for damages for the loss of the *Proteus* is dead.

For when two tort-feasors by their concurrent negligence have caused an injury to a third person, they are

jointly and severally liable to him under the salutary doctrine laid down in the overwhelming majority of the courts of this country.*

It is true that in Pennsylvania and in England to constitute a joint tort you must find the tort-feasors acting in concert.**

But that is not the law in this Court.

The Atlas, 93 U. S. 302, at page 318;
Boyer v. *Sturgis*, 24 How. 122.

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* *The Atlas*, 93 U. S. 302, 318 (1876)—concurrent fault of two vessels;
Colegrove v. *N. Y. & N. H. R. R.* (1859) 20 N. Y. 492—concurrent negligence of two railroads;
Carlton v. *Boudar* (1916) 118 Va. 521—concurrent negligence of carrier and a third person;
Walton, Witten & Graham v. *Miller* (1909) 109 Va. 210—concurrent negligence of independent contractor and railroad;
Feneff v. *Bos. & Me. R.* (1907) 196 Mass. 575—concurrent negligence of two railroads;
Cuddy v. *Horn* (1881) 46 Mich. 596—concurrent negligence of two steamers;
Drown v. *New Eng. Tel. & Tel. Co.* (1907) 80 Vt. 1—concurrent negligence of independent companies;
Slater v. *Mersereau* (1876) 64 N. Y. 138—concurrent negligence of two contractors;
Corey v. *Havener* (1902) 182 Mass. 250—concurrent negligence of two drivers of separate motor-tricycles;
McClellan v. *St. Paul M. & M. Ry.* (1894) 58 Minn. 104—two negligently caused fires;
Reynolds v. *Kansas City* (1914) 180 Mo. App. 138—concurrent negligence of City and traction company;
City of Louisville v. *Heitkemper's Adm'x* (1916) 169 Ky. 167—coucurrent negligence of City and third person.

** *Howard* v. *Union Traction Co.* (1900) 195 Pa. St. 391;
Thompson v. *London County Council* (1899) 1 Q. B. 840;
Sadler v. *Great West. Ry. Co.* (1896) A. C. 450;
The Koursk (1924) 40 Times L. R. 399.

Indeed, in *The Ira M. Hedges,* 218 U. S. 264 (1910), Mr. Justice Holmes in dealing with the question of contribution between tort-feasors in Admiralty referred to a collision whereby an innocent barge was damaged in collision due to the negligence of two tugs as the "*joint tort*" of the two tugs.

There is not any doubt whatever that under the law as laid down by this Court, the Southern Pacific Company as the innocent owner of the *Proteus* could have sued either the Standard Oil Company or the Director General for the negligent sinking of the *Proteus* and recovered full damages from either tort-feasor, or it could have sued them jointly and recovered a moiety of its damages from each in the first instance, with a right over against the other tort-feasor for any deficiency not paid by the respondent against whom execution first issued.

The Beaconsfield, 158 U. S. 303, 307.
The Atlas, 93 U. S. 302, 315 (1877).
The Alabama & The Gamecock, 92 U. S. 695, 697 (1875).

But once it had received from one of the tort-feasors full satisfaction for its loss, as it has done here, it could not pursue the other tort-feasor for further damages for the excellent reason that it would not have any cause of action left.

The Beaconsfield, 158 U. S. 303, 307.
The Atlas, 93 U. S. 302, 315.

Lovejoy v. *Murray*, 3 Wall. 1, 17.
Jennings v. *Dolan*, 29 Fed. 861.
Albright v. *McTighe*, 49 Fed. 817.
U. S. v. *Murphy*, 15 Fed. 589 (1883).
1 Williston Contracts, Sec. 334, 338a.
26 Harv. L. R., 658.
34 Harv. L. R., 442.
12 Harv. L. R. 66.
Seither v. *Philadelphia Transaction Co.*, 125 Pa. St. 397.

An unconditional release of one joint tort-feasor releases all.

Spiess v. *Sommarstrom &c. Co.*, 272 Fed. 109.
Gold v. *Boston &c. Co.*, 244 Mass. 144.
Savage v. *Stevens*, 128 Mass. 255.

Except as between the two parties concerned in the collision,—and of course subject to statutory limitations such as the Harter Act which is not involved in the present aspect of this case—the Common law rules regarding joint tort-feasors apply in Admiralty.

The Atlas, 93 U. S. 302, 317.
The Beaconsfield, 158 U. S. 303.

It is clear, therefore, that the Southern Pacific is out of the case, and has not any cause of action left and hence has not any right of recovery against the Standard Oil Company or the *Cushing*.

VI. That leaves the equities of contribution to be worked out between the Director General and the Standard Oil Company.

The right of contribution in such a case as this "belongs to the substantive law of the admiralty."

> *The Ira M. Hedges,* 218 U. S. 264, 270.
> *Erie R. R. Co.* v. *Erie & Western Transportation Co.,* 204 U. S. 220.

It is quite true that the pleadings in the case do not show the alignment of the parties properly or portray rightly the existing legal situation.

The pleadings lie thus:

In the petition filed by the *Standard Oil Company, Record,* pp. 1 to 6, it is recited the libel *in rem* had been filed against the steamship *Cushing* in the District Court of the United States for the Southern District of New York *by The Southern Pacific Company,* as owner of the *Proteus. Record,* p. 4.

An answer was filed to this petition jointly by the *Southern Pacific Company,* as owner, and by the *Director General of Railroads. Record,* pp. 6 to 9.

The Southern Pacific Company, as owner of the *Proteus,* and *Director General of Railroads,* also filed a petition for limitation of liability and in that petition, Paragraph 3, *Record,* p. 10, it is stated that the Director General was in effect a demise charterer of the *Proteus,* so as to bring him within the meaning of Section 4286 of the Revised Statutes which read as follows:

"The charterer of any vessel, in case he shall man, victual, and nagivate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title (R. S. 4131-4305) relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

The Paragraph of the petition referred to alleges:

"Third. By said proclamation of December 26, 1917, the President took possession and assumed control at 12 o'clock noon December 28, 1917, of the Petitioner Southern Pacific Company and its property, including its system of coastwise transportation known as Southern Pacific Company (Atlantic Steamship Lines) of which said steamship *Proteus* was a part; and said steamship was thereafter and until her loss as hereinafter set forth in the possession and control of and was operated and utilized by said William G. McAdoo as Director General of Railroads, who manned, victualled and navigated said vessel at his own expense and by his own procurement, and was a charterer thereof within the meaning of Section 4286 of the Revised Statutes. The principal office and place of business of the Director General of Railroads is in the City of Washington, District of Columbia. On January 11, 1919, the petitioner, Walker D. Hines, succeeded said William G. McAdoo as Director General of Railroads and has continued to be and is now Director General of Railroads." *Record,* pp. 10-11.

To these allegations of the petition, the Standard Oil Company filed an answer denying knowledge of the matters alleged. *Record,* pp. 15-18.

The allegations of the third article of the petition were duly established by proof during the trial, and have been confirmed by the proofs taken in this Court.

By order of the District Court, as above stated, on the 6th day of November, 1922, the cases were consolidated.

Accordingly, the pleadings are now locked together, in effect, just as if they consisted of a libel and cross-libel, with the owner of the *Cushing* on the one side, and the owner of the *Proteus* and the Director General, as her demise-charterer, on the other side.

As a matter of fact, it is submitted, for the reasons above given the line-up of the parties which would have reflected the real situation would have been as follows:

The Southern Pacific Company, instead of attempting to limit its liability, a relief which it apparently did not need, should have filed a libel against the *Cushing* or the Standard Oil Company, *and* the Director General of Railroads, claiming from them both the damages it had suffered by the loss of the *Proteus.*

That would have reflected the real legal situation and would have made it obvious on the face of the pleadings, which the present record does not.

It is settled law that there is a new trial in admiralty on appeal to the Circuit Court of Appeals or on *certiorari* to this Court.

Reid v. *Fargo*, 241 U. S. 544 (1916).
Watts, etc. v. *Unione Austriaca*, 248 U. S. 9 (1918).
The John Twohy, 255 U. S. 77 (1921).

Mr. Justice Brandeis said in *Watts, etc.* v. *Unione Austriaca*, 248 U. S. 9, at page 21:

"This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. *Butler* v. *Eaton*, 141 U. S. 240; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 506. And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below. *United States* v. *Hamburg-Amerikanishe Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 478; *Berry* v. *Davis*, 242 U. S. 468; *Crozier* v. *Krupp*, 224 U. S. 290, 302; *Jones* v. *Montague*, 194 U. S. 147; *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120; *Mills* v. *Green*, 159 U. S. 651; *The Schooner Rachel* v. *United States*, 6 Cranch, 329; *United States* v. *The Schooner Peggy*, 1 Cranch, 103, 109-110. In the case at bar the rule is the more insistent, because, in admiralty, cases are tried *de novo* on appeal. *Yeaton* v. *United States*, 5 Cranch, 281; *Irvine* v. *The Hesper*, 122 U. S. 256, 266; *Reid* v. *American Express Co.*, 241 U. S. 544.

"Since the certiorari was granted, the relation of the parties to the court has changed radically. • • •"

We must look, therefore, at the facts, as now developed on the new evidence taken in this court.

That evidence shows, as has been stated, the situation of a settlement by the bailee charterer,—the Director General,—with the bailor owner,—the Southern Pacific Company,—and a release from that company in full satisfaction of all its claims against the bailee then existing or that might thereafter arise in connection with the use of the companies' property during the period of Federal control or out of the contract of February 19, 1919.

It is, apparently, usually stated that the principal basis of a bailee's right to sue a third party is the bailee's liability over to the bailor.

An occasion when this question was under discussion in this Court was the case of *Pendleton* v. *Benner Line*, 246 U. S. 353 (1918), in which a voyage charterer the Benner Line, had held itself out as a common carrier, received consignment of the goods, fixed and collected the freight, and issued shippers bills of lading which were signed by the master or agents of the vessel.

In spite of the fact that the master or agents of the vessel had signed the bills of lading, it was held that the Benner Line, as voyage charterer, was sufficiently the bailee of the goods under its contract as common carrier, to maintain an action against the unseaworthy carrying vessel to recover for the loss of the goods.

In that case Mr. Justice Holmes said in regard to this theory of the bailee's right of action against third parties 246 U. S. at page 356:

> "* * * Whatever may be the inadequacy, in history or theory, of the reason as applied to torts, it applies with real force to contract relations like those in this case. * * *"

Here the Director General had a contract of indemnity with the Southern Pacific Company and in view of the doctrine of contribution between tort feasors in collision cases,* the bailee's situation in this case is removed from any zone of perplexity either of theory or practice.

There is not any subrogation involved in a situation like this, as was pointed out by the Circuit Court of Appeals for the Second Circuit in *The Jersey City,* 51 Fed. 527 (1892). There the owner of a tug, which was the bailee of a tow, sued *The Jersey City* for damaging its tow. A subrogation agreement had been secured from the owner of the tow.

In that case, Judge Wallace, writing the opinion of the Court, 51 Fed. 527, said at page 528:

> "The question whether the libelant became subrogated to the claim of the Delaware & Hudson Canal Company does not affect the right of the libelant to recover. It has been unnecessarily introduced into the controversy. The libelant was a bailee of the property injured. * * *"

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* *Erie R. R.* v. *Erie & W. Transp. Co.,* 204 U. S. 220;
The Ira M. Hedges, 218 U. S. 269 (1910);
The Thekla, decided by this Court Nov. 21, 1924;
The Hudson 15 Fed. 162 (1883), which contains a learned discussion of the whole doctrine by Judge Addison Brown.

As a result in that case the Cornell Steamboat Company, libelant, was allowed to recover against the wrongdoer, the steamship *Jersey City*, as damages *the amount which it had paid to the owner of its tow in settlement of the damages received by the latter.*

In this connection, it might be of value to observe that in the case of a total loss by collision the value of the vessel at the time of the collision is the measure of the recovery and future profits are not taken into consideration. The theory, apparently, is that such profits are compensated for by the legal rate of interest which runs on the amount allowed as the vessel's value.*

The Umbria, 166 U. S. 404, 421 (1897).
The George W. Roby, 111 Fed. 601, 615 (C. C. A., 6th Cir. 1901).
The Fontana, 119 Fed. 853, 961 (C. C. A., 6th Cir. 1903).
The Menominee, 125 Fed. 530 (1903).
The Havilah, 39 Fed. 333 (1889).

In all the cases just cited, suit was brought by the owners, but the question of the damages on the present state of this record would not involve a different principle in the case of the Director General than in those cases. The fact that subsequent profits cannot be proved seems to be based on the uncertainty of sea ventures, which would prevent it being proved with reasonable certainty that the lost vessel could have earned the prospective

* Indeed, that was the thought behind Judge Mack's remark at the end of his opinion confirming the commissioner's report, where he spoke of the prorating of the interest between the Southern Pacific Company and the Director General. *Record*, p. 196.

profits in the event she had not been lost. Other collisions or disasters might have prevented her further profitable use.

Consequently the value of the *Proteus* at the time of her loss, with interest until paid, was the proper measure of damages recoverable for the loss of the *Proteus*.

VII. Now, therefore, that the Southern Pacific Company has been cut out of the case by the satisfaction of its claim, the only question left is what allowance the Director General should have in the collision adjustment in respect of the *Proteus*.

The Director General has not made or proved any claim for any damages personal to him as bailee.*

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* The following are the recitals of the final decree in the District Court:

> "And it appearing that the damages sustained by the Southern Pacific Company and James C. Davis, Director General of Railroads, as agent, as owner and charterer respectively of the steamship *Proteus* and as bailee of the effects of passengers, master, officers and crew of the *Proteus* and as bailee of certain cargo amount to the sum of $830,412.19 together with interest to November 28, 1922 in the sum of $213,078.10 and costs as taxed in the sum of $365.75 making a total of $1,043,856.04.
>
> "And it appearing that the total damages arising from the said collision amount to the sum of $1,686,814.30 which sum includes interest to November 28, 1922 and costs as taxed it is further Ordered, adjudged and decreed that the Southern Pacific Company (Fol. 898) and James C. Davis, Director General of Railroads, as agent, recover from the petitioner, Standard Oil Company (New Jersey) with interest until paid the sum of two hundred thousand, four hundred forty-eight and 89/100 dollars ($200,448.89) being one-half of the difference between the amount of their damages as aforesaid including interest to November 28, 1922, and costs and damages sustained by the Standard Oil Company (New Jersey) as owner of the *Cushing*, with interest to November 28th, 1922 and costs, including the amount paid by the Standard Oil Company (New Jersey) to the cargo claimants as aforesaid, * * *"

Record, p. 216.

The Director General did not appeal from this decree and, therefore, we submit, cannot be allowed more than the District Court allowed as the value of the *Proteus* because he did not appeal from that valuation. Cf. *The Beaconsfield,* 158 U. S. 303, 310.

If we are wrong as to this, certainly there is not any question but that the largest claim, which he can now possibly make, is for reimbursement to the extent of the amount which he had paid to his bailor in settlement of his contract obligation to make the bailor whole.

To allow him more would be to give him an excess as to which he has not made out any right.

It would seem perfectly clear, both from the history of bailment and from the common sense of the situation, that the charter-bailee cannot under such circumstances as these be allowed, in a collision adjustment with a third party whose negligence contributed to the loss, of any greater amount than he has actually paid to his owner-bailor.

It would follow, therefore, in this case, that as the Railroad Administration has settled with the Southern Pacific Company for the value of the *Proteus,* the greatest amount that can be allowed to the Railroad Administration in the collision adjustment is the amount which it has paid to the Southern Pacific Company on its settlement. For that represents the agreed damage suffered by the thing bailed whilst in the bailee's possession.

Cf. Vermilye v. *Adams Express Co.*, 21 Wall. 138, 147.
The Jersey City, 51 Fed. 527 (1892).

By such an allowance as is suggested all the parties would have received full compensation—the Southern Pacific Company by its agreement to the settlement as evidenced by its release, and the Railroad Administration by receiving an allowance equivalent to the money paid by it for the loss of the *Proteus* to the Southern Pacific Company.

If the Court does not consider that the amount of the payment is sufficiently clearly proved by the evidence of the Director General of Railroads, that amount can be determined by a reference to a master as is the common practice in admiralty causes, when, after the merits have been decided, the damages have to be determined.

It should be noted that in dealing with the valuation of the *Proteus* in this point we are not discussing the question of a direct recovery by the Director General in any way whatsoever. We are dealing merely with the amount which should properly be *credited* in the collision adjustment, on the basis of both to blame, in favor of the Railroad Administration as against the Standard Oil Company.

It is submitted, therefore, that this Court should deal with the parties before it in this case as follows:

To the Standard Oil Company, it should say:

> "You have been guilty of a wrong for which you have been held partly to blame and which caused the loss of the *Proteus.* The question is, what will constitute under the doctrine of admiralty law of cross-liabilities a compensation to the persons damaged by such loss."

To the Southern Pacific Company, it should say:

> "You have been damaged by the loss of the steamship *Proteus,* but have accepted from the Director General of Railroads, by whom you were indemnified under a contract, a sum of money equal to the value of the *Proteus* and have released your claim against him without reservation. You have therefore been compensated for her loss."

To the Director General of Railroads, it should say:

> "You did not appeal from the decree of the District Court and hence you cannot recover more than that decree allowed."

Or it might say:

> "You have paid a certain sum to the Southern Pacific Company for the loss of the *Proteus* which is the measure of your damage in the collision and you should not be allowed a credit of more than this sum in the collision adjustment. If you are allowed a credit of this sum in the collision adjustment, you will have been made whole."

Such a disposition of the case would be in accordance with the authorities as applied to the facts newly brought out; it would be just to the parties; it would be in accordance with common-sense.

It is submitted, that however complicated the processes of approach to a decision may be, when we reach a point where, as here, law, justice and common-sense converge, it is clear that we have the solution of the controversy.

SECOND POINT.

THE RULE OF DAMAGE APPLIED BY THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT IS ERRONEOUS IN THAT IT IS BASED ON AN ARBITRARY FORMULA, THE TWO FACTORS OF WHICH ARE A SPECULATIVE REPRODUCTION COST, AND AN UNCERTAIN DEPRECIATION RATE; AND WHICH OPERATES TO EXCLUDE OTHER MATERIAL FACTORS IN ARRIVING AT FAIR VALUATION. THE PROPER RULE IS THAT ADOPTED BY THE DISTRICT COURT, AND BY THE COMMISSIONER, WHEREBY, IN THE ABSENCE OF A PROVABLE MARKET VALUE, ALL OTHER RELEVANT FACTS ARE CONSIDERED IN DETERMINING THE MEASURE OF THE LOSS.

I. THERE WAS NOT ANY MARKET VALUE FOR THE *Proteus* AT THE TIME OF HER LOSS.

It is conceded that there was not any "market value" for (American) vessels at the time of the loss of the *Proteus* (August 19, 1918).

The Commissioner before whom the valuation first came for determination found:

> "* * * The market for all such ships was closed during the war and in August, 1918, the *Proteus* had no market value. * * *" *Record*, p. 183.

The District Court also found:

> "In August, 1918, practically all American ships of the size and type of the *Proteus* were

> under requisition, and the market for all such ships was for all substantial purposes closed, during the war. * * *'' *Record*, p. 192.

In the case of *Gulf Refining Company* vs. *The United States*, No. 34120 Court of Claims, decided October 29, 1923, 58 Ct. Cl. 559, the Court found among other facts as follows at page 566:

> ''X. On and after October 12, 1917, and during the time when plaintiff's vessels were held by the United States, practically all tank steamships in the world were commandeered, seized, or chartered by the allied belligerent nations, or by the United States, and practically all available shipyards, and shipbuilding facilities were similarly commandeered or seized, so that during the period when plaintiff's vessels were held by the United States, it was not possible for plaintiff to replace the same by purchase or hire in the open market or by contracts for new construction.''

It appears also from the facts as found that the vessels were held by the United States from dates varying between October 16, 1917 until June 14, 1919 (including the date of loss of the *Proteus*).

[According to the Shipping Board's letter of September 27, 1917, which is quoted by the Court, ''the Shipping Board finally determined upon $175. per deadweight ton as the average value for requisitioned tonnage, * * *'', which has a direct bearing on the value of *Proteus*, post, p. 67].

The Circuit Court of Appeals, while stating that the measure of the damage ordinarily would be the ''market

value" of the vessel, also held that during the period of Federal control of the *Proteus* "the owner could not have sold her or would have to sell her subject to control by the Government", and, although intimating that on her loss, if the owner had then been free to sell the *Proteus,* there would have been a market, nevertheless, the Court assumed: "There was no market value in August 1918", and proceeded to fix the value on that assumption. *Record,* pp. 228-229.

The burden of proof to establish the loss rested on the *Proteus* interests (Southern Pacific Company and Director General of Railroads). *The Conqueror,* 166 U. S. 110. That burden of proof meant the establishment of a monetary loss, and, "the amount of loss is as much to be proved as the fact of loss." *Sedgwick on Damages,* 9th Ed. Vol. I, p. 181. Recognizing the impossibility of establishing a "market value" in the sense of a sale value of the *Proteus,* it was sought to establish a value for the *Proteus* as a measure of the loss which was based, as the Commissioner stated, "principally upon the testimony of experts with respect to what, in their opinion, it would have cost to reproduce the *Proteus* in August, 1918, * * *". *Record,* p. 183. That evidence was met not only by testimony of other experts in opposition, but by the introduction of testimony bearing on all other relevant factors making up the value of the vessel. *Record,* pp. 183-184.

At the inception of the case on the record, therefore, it becomes necessary to approach the question raised here with the premise that the ordinary test of ascertainment of the measure of damage of a vessel totally lost, namely, "market value", is absent.

II. The Circuit Court of Appeals based its valuation of the *Proteus* squarely and exclusively on the reproduction and depreciation theory.

It was stated by the Circuit Court of Appeals that, "these special circumstances invoke the rule of damages of cost of production less depreciation", the special circumstances being the absence of a market value and the impossibility of having a vessel constructed at the time of the loss. *Record,* p. 229. Although the court used the word "production", the text of its opinion, and its conclusions, show that it meant the cost of present construction of a new vessel, and not the original cost of producing the *Proteus.* In other words, the word "production" meant "*re*production".

By application of that theory, and by applying the somewhat arbitrary figures to represent the two factors, "cost of reproduction" and "depreciation", a result was obtained as representing the measure of the loss in the sum of $1,225,000, which increased the valuation as fixed by the Commissioner and confirmed by the District Court, to almost double the amount that had been awarded as the measure of the damage.

That conclusion, as has been mentioned previously, was substantially an exclusive acceptance of the statement of only one of the several witnesses who testified, this witness having stated in answer to the question as to the basis of his valuation in that amount ($1,225,000) as follows:

> "There being no sales to guide me, I took the estimated cost of the reproducing a vessel of the

> same size and description as the *Proteus* in August, 1918; and the estimated cost was $1,750,000. From that cost I deducted two and one-half per cent for eighteen years' depreciation, which is $525,000, leaving a value of ($1,255,000) $1,225,000."* *Record*, p. 31.

An analysis of the two factors entering into this calculation shows the fallacy of the result.

III. THE FACTOR OF "COST OF REPRODUCTION" WHICH WAS TAKEN TO BE $1,750,000, IS HIGHLY SPECULATIVE AND EXCESSIVE.

Our contention is that "cost of reproduction" under the circumstances here stands substantially on the same footing as "market value". In the latter case, and in the sense of a market value for *sale* purposes, it has been conceded, and, in fact, found by the courts which passed on this particular case, that the measure of loss was not ascertainable by application of the market value theory for the reason that there was not any market for the *Proteus* at the time of her loss, and there could not have been any prior to March 1, 1920, when Federal control ceased. Also, it is equally true that there could not have been a replacement by new construction, that is, a *reproduction* of the *Proteus* at this time, because of the

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* This figure is erroneously printed in the record, where it appears as $1,255,000. The original record in the District Court and in the Circuit Court of Appeals contains a correct printing of the figure in the sum of "$1,225,000". It is also clear from the question which contains the correct figure, $1,225,000, as well as by subtracting the two other figures given by the witness ($1,750,000 and $525,000) that the figure should be $1,225,000, as it appears in the original records.

impossibility of having a vessel built during this period, at least for a private owner. This condition with respect to the impossibility of reconstruction, is established by the testimony of the witness produced by the respondents for the sole purpose of obtaining an "estimate" of what it might have cost to reconstruct the *Proteus* at that time, if it had been possible to do so. That witness, Mr. Palen, frankly admitted that his company could not have done the work of reconstruction, for, as he said, "our plant was entirely under the control of the Government as to its output." The Commissioner found that "such was the case generally"; and, it is a well-known fact that all of the ship-construction works were operating solely for the Government at this time, and were forbidden to undertake any contract not governmental in its nature. *Ante*, p. 61.

Despite that admitted condition, the respondents insisted in advancing the "reproduction" theory exclusively, and Mr. Palen made some calculations which purported to represent what it would have cost to build a vessel like the *Proteus* at the works of his company (Newport News Shipbuilding & Drydock Company) where the *Proteus* had been originally constructed in 1900, giving as his figure the sum of about $1,750,000. *Record*, p. 129.

The original cost of the *Proteus* in 1900 was $540,400, *Record*, p. 130; not $557,600 as was assumed by the Circuit Court of Appeals. *Record*, p. 230.

Mr. Palen's estimate of the reproduction cost as of the date of loss is, therefore, considerably more than three (3) times the actual cost of the vessel originally.

It may be remarked that Mr. Palen gave the actual cost as $1,494,000, but he added $261,450 for *profits.* It seems that the profit on the original construction was only $33,250, so that his estimated profit on the new construction as of the date of loss was eight (8) times as much as the profit made on the original construction. It is also seventeen and a half (17½) per cent of the total cost including the heavy "overhead" and operating expenses of $268,000 in Mr. Palen's estimate. The item of profit alone in the estimate represents at least seven and a half (7½) per cent more than the ordinary Government contracts prevailing at the time of "cost plus ten (10) per cent." The estimates for high cost of material and labor, as given by Mr. Palen, seem equally inflated. *Record,* pp. 127, 129.

It is to be borne in mind that Mr. Palen was not making an estimate with a view to actually reconstructing the *Proteus.* Indeed, he so admitted in his testimony. Obviously, the object of the respondents was to obtain testimony establishing a high (it may be said prohibitive) cost of reproduction, speculative although it was. If it had been possible to replace the *Proteus,* and if it had been intended by her owner to replace the vessel, perhaps the testimony might have had some weight; but, it was at best a gesture, and was not in any sense a real, certainly not a competitive, bid for replacement.

As appears from the testimony of other witnesses who were in a position to know, the tendency of shipbuilding companies at that time in giving such estimates of cost of reconstruction, was to state a price in a very much higher figure than the actual cost. *Record,* pp. 90, 119, 187.

The estimate of Mr. Palen compares unfavorably with actual cost of construction of Shipping Board vessels, which it was said by one of the respondents' witnesses would average from $30 to $40 more than $180 a gross ton, or about $220 per deadweight ton. *Record,* p. 57. If the latter figure should be accepted, the reproduction cost of the *Proteus* at war period prices might have been as much as $847,000. *Cf.* letter quoted *ante,* p. 61.

Another witness, Mr. Morrell, who testified on behalf of the petitioner, gave the reconstruction cost of "tankers" as from $190 to $195 per deadweight ton. The cost of such a vessel (oil tanker) is ten to fifteen per cent more than an ordinary freight carrying vessel. *Record,* p. 70. Even making an allowance for a possible additional cost of construction of a combined passenger and freight carrying vessel, the probable reproduction cost of the *Proteus* at this period (assuming that it could have been rebuilt), would be less than $800,000, the deadweight capacity of that vessel being less than 4,000 tons. *Record,* pp. 28, 59, 114. The exact deadweight tonnage was stated as 3,800 tons. *Record,* p. 59.

It is not our purpose to contend that prices of material and labor were not on a high scale at the time of the loss of the *Proteus;* but, it also cannot be denied that such abnormal prices as prevailed during the war period were transitory, even for vessel property, and that vessel values dropped rapidly before the time when the *Proteus* would have been relinquished from Federal control and redelivered to her owner, namely, March 1, 1920. Indeed, in the case of *Galveston Electric Co.* vs. *City of Galveston,* 272 Fed. 147, p. 157, it was found that the

average price of commodities on January 1, 1920, was only about a third more than the prices prevailing on August 1, 1914.

One of the witnesses for the respondents, Mr. Raymond, seems to have recognized the rapid drop in vessel values, as he was of the opinion that the sum of $100 per ton deadweight would have been a fair sale price ("market value") as of early 1920, prior to the time that the *Proteus* would have been redelivered to her owner. Indeed, it seems that Mr. Raymond had advocated the sale of Shipping Board vessels at that price, and he had predicted that values would drop even lower. According to him the actual demand for vessels "after the armistice and up until say 1920" was only from new companies. *Record,* pp. 61, 68.

The foregoing suggestions indicate that Mr. Palen's so-called "estimate" was not only in its nature speculative insofar as it bears on the present case, but it was essentially based on highly transitory and inflated values.

It is submitted that one of the two factors on which the conclusions of the Circuit Court of Appeals are based, is not justifiable, and the adoption of the excessive figure ($1,750,000) to represent that factor was productive of a result which cannot fairly represent a measure of the damage.

IV. THE SECOND FACTOR, THAT OF "DEPRECIATION", WHICH THE CIRCUIT COURT OF APPEALS ASSUMED TO BE TWO AND A HALF (2½) PER CENT. PER YEAR, WAS ALSO UNREASONABLE AND UNDULY ADVANTAGEOUS TO THE RESPONDENTS, AND ITS ACCEPTANCE GREATLY ENHANCED THE RESULT OBTAINED BY THE FORMULA, AND TO THE DISADVANTAGE OF THE PETITIONER.

"Depreciation" was defined in the case of *San Francisco & P. S. S. Co.* vs. *Scott, Collector of Internal Revenue,* 253 Fed. 854, at page 855, as follows:

> "'Depreciation' as used in the statute is not to be confused with ordinary repairs. It is intended to cover the estimated lessening in value of the original property, if any, due to wear and tear, decay, or gradual decline from natural causes, inadequacy, obsolescence, etc., which at some time in the future will require the abandonment or replacement of the property, in spite of ordinary current repairs."

The question arose there by reason of deduction in fixing a valuation for tax purposes; but the same definition is applicable to any property valuation involving comparison of old with new construction.

The Circuit Court of Appeals in accepting the testimony of the one witness to which reference has been made previously, and applying a depreciation of two and a half (2½) per cent. per year, stated:

> "* * * There is no fixed rule as to the amount of depreciation to be deducted, but two and a half

per cent is reasonable in application for a period when there was such demand for vessels. Obviously, it might be unreasonable in other periods. The rule has varied between three and five per cent for depreciation in tax matters. The Treasury Department bulletin of January-June, 1920, fixed two per cent as the rate of depreciation on steamships. Two and a half per cent is said by the experts to be used here because of the unusual high standard of upkeep of the *Proteus.*" Rec*ord*, p. 230.

It is obvious that the higher the reproduction cost and the lower the percentage depreciation, which should be accepted by the Circuit Court of Appeals, as fixing the two factors used by it in calculating its somewhat arbitrary formula, the higher would be the result obtained. Just as the first factor discussed in the preceding text is the highest possible figure, so the second factor (depreciation) has been taken as the lowest possible amount; and, as we contend, the second factor, "percentage of depreciation", is equally unjustifiable under the circumstances.

The *Proteus* was constructed and delivered to her owner in June, 1900. *Record*, pp. 46, 121. The vessel, therefore, had been in operation up to the time of her loss (August, 1918) a period of eighteen (18) years. The authorities are in agreement that a reduction must be made depending on the age of the vessel under the reproduction theory. There is some diversity of opinion as to the amount or percentage of depreciation per year to be applied.

The Circuit Court of Appeals in this case apparently justified its application of a low depreciation by reference to "Treasury Department Bulletin of January-June, 1920", which, so the Court stated: "fixed two per cent as the rate of depreciation on steamships." *Record*, p. 230.

The Court presumably refers to a report in the Treasury Department Bulletin No. 2, January-June, 1920, Income Tax Revenues, page 139, where it appears that the Committee on Appeals and Review Recommendation (A. R. R.) increased the rate from 2 to 3, as an allowance for yearly depreciation on certain steamships of the Great Lakes.

It is to be noted that the Committee of Appeals and Review remarked that "the decision in question was based on an informal memorandum sent to the Unit, upon a specific case."

Furthermore, the Circuit Court of Appeals did not notice or take into consideration the fact that in the particular case to which it referred the rate was increased to three (3) per cent, the Committee stating:

> "The Committee accordingly recommends the establishment of a rate of three (3) per cent upon the vessels engaged in the bulk freight traffic" (certain vessels of the Great Lakes trade).

It seems clear that the Circuit Court of Appeals accepted the report of a two (2) per cent rate, as quoted from the Treasury Department Bulletin, without knowledge that it had been shown to have been too low, and that it had accordingly been increased to three per cent

by the Appeals Committee, as is recorded in the Treasury Bulletin cited.

Other decisions for taxation purposes indicate more liberal allowances for "depreciation".

In Treasury Bulletin No. 2, July-December, 1921, pages 148-150, the Solicitor's opinion quotes from the "present law" (Revenue Act of 1918) as follows:

> "Section 214 (a). That in computing net income there shall be allowed as deduction: • • •
>
> "(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

Cumulative Bulletin No. 3, July-December, 1920, issued by the Treasury Department (Bureau of Internal Revenue) on Income Tax Rules, at page 168, cites a decision of the Committee on Appeals and Review Recommendation of 1920, case No. 279, as follows:

> "The subject of depreciation of steam schooners engaged in the coastwise lumber trade has received the careful consideration of the Unit and at a conference between the president of the Ship Owners' Association of the Pacific Coast, professional accountants representing that association and officials of the Income Tax Unit, it was agreed after full discussion that the proper annual rate of depreciation on vessels of this class engaged in this trade is 5 per cent, based upon an expected life of 20 years."

Cumulative Bulletin III-I of January-June, 1924. Decision of Committee on Appeals and Review Recommendation, No. 4822, on Section 214 (a) 8 of Internal Revenue Act of 1918, on the subject of depreciation of certain freight and passenger steamships for tax purposes. The decision is to the effect that: "The Committee finds that the rate of five per cent depreciation claimed by the company on certain ocean freight and passenger steamships for the years 1918 and 1919 is not excessive and should be allowed." P. 159.

The case was submitted to the Committee as an appeal from the action of the "Income Tax Unit" which had reduced the claim of five per cent per annum depreciation on six steamships to an allowance of four per cent per annum on the cost, this being made up of three per cent for ordinary depreciation and one per cent additional allowed during the period of war service.

It appears that the vessels in question are high speed combination freight and passenger steamships. The Income Tax Unit had concluded that "it is not exceptional to find steamships making regular runs even though they have been in service for more than 33⅓ years," and in view of that fact the Unit concluded that a three per cent allowance for ordinary depreciation would be ample. The Committee on Appeals, however, increased the rate to five per cent depreciation (on first cost), and stated, at page 161:

> "It is probable that no rate of depreciation can be laid down which would apply to all companies operating ocean-going steamships. The

following authorities fix a minimum 4 per cent rate of depreciation for vessels: Accountant, January 1, 1916; Economist, May 16, 1914; Auditing, Theory and Practice, Montgomery (1916); Income Tax Procedure, Montgomery (1919 and 1920). By the Peninsular & Occidental Steamships Lines and the Royal Mail Steamship Packet Co. and by Accounting and Commissions, in the November issue of 1915, and by the Accountant in its issue of May 28, 1898, a 5 per cent rate is considered to be proper; by the Accountant of December 21, 1889, a rate of from 6 per cent to 7 per cent appears to be estimated as soundly based; and by the Philippine Islands Board of Public Utility Commissioners a proper rate of depreciation on steamships has been found to be 6½ per cent. (In re Manila Railroad Co., P. U. R. 1915, ch. 711, p. 722)."

The Treasury Department has also held that an annual rate of depreciation of five per cent is reasonable under ordinary circumstances on steam schooners engaged in coastwise lumber trade. *A. R. R. 279, T. B. 42-20-1245,* where it was stated:

"The subject of depreciation on steam schooners engaged in coastwise lumber trade has received the careful consideration of the Unit • • • it was agreed after full discussion that the proper annual rate of depreciation on vessels of this class engaged in this trade is five per cent, based on an expected life of twenty years."

In *Holmes Federal Taxes*, 1923 Edition, page 835, the author states:

> "In the case of some ships constructed during the war there seems to be a tendency to allow even a greater rate of depreciation, on the theory that the useful life will be less than twenty years."
>
> • • • • • • •
>
> "In a case involving the depreciation of a steamer, it has been conceded that 5% of the book value thereof was reasonable. In the case of some ships constructed during the war there seems to be a tendency to allow even a greater rate of depreciation on the theory that the useful life will be less than twenty years. The rate of 3% has been ruled to be reasonable for bulk freight steamships on the Great Lakes; • • •. The department has ruled that the proper annual rate of depreciation on steam schooners engaged in the coastwise lumber trade is 5%." Page 835.

The author further states at page 841, par. 16, in reference to Revenue Act of 1918, Par. 214 (a) 8 and 234 (a) 7, respecting "obsolescence":

> "Obsolescence is that loss which occurs in respect of tangible property from the changes due to the normal progress of the art in which such property may be used, or to becoming inadequate to the growing needs of the business. • • • It has its origin in the fact that although the original efficiency be maintained, yet, owing to improvements in the art or changed economic conditions, a device or factor in production will eventually have to be discarded."

In the case of Nicholas A. Galanos, dealing with income taxes for the years 1918 and 1919, Income Tax Unit allowed depreciation of the high rate of twenty-five per cent per annum on the Steamship *Antonios* and the Steamship *Elrini* (I. T.—P. A. 2—L. H. D.—205 App.).

The Treasury Department in Article 162 of Regulations 33 states:

> "No definite rate has been fixed by which an allowable deduction on account of depreciation in the value of any class of property subject to wear and tear is to be computed, but it is contemplated that this allowance should be upon the basis of the cost of the property and the probable number of years constituting its life."

A rate of five per cent (5) of the book value (for each year) as depreciation, was held to be a reasonable allowance for deduction from value, in the case of *San Francisco & Portland SS. Co.* vs. *Scott, Collector of Internal Revenue,* 253 Fed. 854.

Also, in the case of *United States* vs. *Standard Oil Company,* 258 Fed. 696, the same percentage of depreciation was approved by the Court, namely, five (5) per cent per annum.

A depreciation of five per cent (5) per annum was approved and adopted by Judge Hale in the District Court of Maine, in arriving at the value of an oil tankship, although he did not favor the reproduction and

depreciation method on which the valuation was based in the absence of evidence of market values, or any other evidence of value. *The Anahuac,* 295 Fed. 346, p. 348.

A deduction of as much as six (6) per cent per annum may not be unreasonable. *The Harmonides,* 1903 Prob. Div. I.

Under the foregoing authorities, it will be seen that a depreciation of as low as two and a half (2½) per cent which the Circuit Court of Appeals applied to the *Proteus* in the present case, is far below that ordinarily accepted and used in practice. Indeed, it is lower than is warranted by the testimony in the record on this point, which follows:

Mr. Martin admitted that in ordinary times, it is the practice to deduct five per cent for depreciation; but, for reasons which do not seem to be clear in the testimony, he stated that "during the last four years we have never taken off more than two and a half per cent during the war. I do not mean the last four years, I mean during the war, when vessel property was very valuable, the appreciation more than made up for the depreciation."

The Commissioner commented on Mr. Martin's views as to making a further reduction for depreciation because of war conditions, as follows:

> "• • • In normal times he would have deducted 5% for depreciation, but because of the War, thought half that amount sufficient. In this connection it is to be noted that depreciation is

> supposed to represent ordinary wear and tear and that the replacement value was fixed at War prices. It would seem, therefore, that full effect was given to the War in fixing the value to be depreciated and that the normal depreciation (assuming it to be something that can be determined by a general rule) should not be changed. The *Proteus* was maintained in first class condition but the actual wear and tear during War conditions was certainly not less than during normal conditions, although there is evidence that the ship was not operated 'more strenuously after the Railroad Administration took charge'." *Record*, p. 185.

It is obvious that if an appreciation is allowed, the *rate* of depreciation should not be altered. Mr. Martin, after taking what we maintain is an excessive figure for "estimated cost", "deducted two and a half per cent for eighteen years' depreciation, which is $525,000".

Mr. Martin made a serious error in this calculation.*

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* We have carefully calculated from Mr. Martin's figures what would be the result by applying to $1,750,000 his depreciation of two and a half (2½) per cent for each year, both on the first amount, and the yearly depreciated amount. The results of our careful calculation are as follows:

If we should take $1,750,000 as the principal, and reduce it directly by two and a half (2½) per cent for eighteen (18) years, which would be taking off forty-five (45) per cent, the amount to be deducted as representing that depreciation would be $787,500, as against the $525,000 which Mr. Martin actually used. In other words, by that method, his result is $262,500 too great.

Again, if instead of applying the total depreciation direct to the base figure ($1,750,000) we apply year by year, and reduce each product by two and a half (2½) per cent, the total depreciation to be deducted amounts to $640,406.65. Under that method, Mr. Martin's result is too great by $115,406.65.

The Circuit Court of Appeals carried over the same arithmetical error by adopting *in toto* Mr. Martin's conclusions.

If he applied the principle, which he said was the practice, he should have deducted five per cent for all but the last year. His high valuation is explained by his misapplication of the depreciation rate. That also may be said of the other "estimators" for the Respondents.

Mr. Alfred G. Smith said that he "would use the same figure I have used for years, and that is three per cent; roughly speaking, three per cent." Five per cent has been the normal depreciation. Although Mr. Smith stated that he figured "about three per cent" for a depreciative valuation, his deduction of $650,000 on a $2,000,000 first cost, is not in accordance with the rate of depreciation which he alleged that he used. *Record,* pp. 41, 42.

H figures actually indicate a deduction of *thirty-two and a half per cent* for the eighteen years, whereas his testimony indicates that he should have deducted *fifty-four per cent!* His error is as great as Mr. Martin's.

Mr. Raymond maintained that there was not any fixed rule of depreciation, but, he testified that from what he could find out as to what "the average was with all the lines in the United States and those of Great Britain, it would be from three and a half to four and a half per cent." Very few of them are in excess of four and a half per cent. The Ocean Steamship Company used five per-cent. In arriving at his estimated value, however, Mr. Raymond states that he "used five per cent and then gave them credit for being fifty per cent better than the other

fellow", so that "it substantially amounted to two and a half per cent." That, in addition to the excessive initial production cost, largely explains Mr. Raymond's high valuation. Mr. Raymond's view was that five per cent should be used in writing off depreciation, in a table he referred to before the Senate Committee of Commerce in valuations of vessel properties. His final conclusion seems to be that "everybody has got up to five per cent or more, five to ten." *Record,* pp. 63, 66.

Mr. Morrell testified as to the Petitioner's practice of depreciating five per cent on the original first cost for the first sixteen years, and after that, deducting two and a half per cent for four years. *Record,* p. 71.

Mr. Swasey and Captain Gillmor adopted what seems to have been a carefully prepared depreciation table known as the Stevenson-Taylor method, which is used by the American Bureau of Shipping, and which resulted in fixing the valuation of a vessel eighteen years old at .452 of its first cost. *Record,* pp. 87, 102, 110, 115.

Mr. H. B. Walker favored "three per cent on the original cost", which would give the vessel a life of thirty-three and one-third years. He said that some other lines use five per cent on a depreciation cost, that is, taking the original cost and reducing each year, and *other lines used* a higher rate of depreciation during the war. *Record,* p. 175.

The method of depreciation used by the Advisory Board to the War Risk Bureau appears on the scale valuation marked as an exhibit. *Record,* pp. 160-161. Appendix No. 3.

It appears from the statement of the Southern Pacific Company that the rate of depreciation used by that company as applied to the *Proteus* was three and three-fourths per cent per annum, which would result in placing the valuation of the vessel at thirty-two and a half per cent of her first cost, at the end of eighteen years. *Record,* p. 144.

The comparison of the foregoing estimates shows that the Stevenson-Taylor method is perhaps the most conservative of any, permitting as it does, a life of forty years. *Record,* p. 96.

We have dwelled at length on the factor of "percentage of depreciation" because it seems plain that the Circuit Court of Appeals for the Second Circuit did not give this subject due consideration in its application to the valuation of the *Proteus.* There was some testimony to the effect that the *Proteus* had been well-maintained; but, such testimony was in the nature of "hearsay", as those who testified had not recently been on board that vessel. It is also to be remembered that she had been in war service for a considerable time, and there is not any evidence whatever that the *Proteus* had undergone reconditioning or repairing during that period at least. Moreover, the Stevenson-Taylor table for depreciation was based on the long life of at least forty years, which the testimony indicates is a maximum.

It is submitted that the Circuit Court of Appeals erred in its assumptions of the two controlling factors, therefore, in that it placed a very much higher reconstruction cost than was justifiable under the circum-

stances (apart from the speculative nature of the testimony on which that value was founded), and also in that it applied a rate of depreciation very much less than has been used in any other recorded case, or in practice.

A correction of these two major errors would reduce the result even below the amount awarded by the Commissioner and the District Court, namely, $750,000.

V. THE APPLICATION OF THE REPRODUCTION AND DEPRECIATION METHOD SO EXCLUSIVELY AS WAS DONE BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THIS CASE, IS NOT SUPPORTED BY THE WEIGHT OF THE AUTHORITIES.

The cases show a wide latitude in considering all elements which may bear on the question of the measure of the loss under the circumstances here: *The Colorado,* Brown Adm. 411, Fed. Cas. No. 3029; affirmed by this Court, *The Colorado,* 91 U. S. 692; *Leonard* v. *Whitwill,* 19 Fed. 549; *City of Alexandria,* 40 Fed. 697; *The H. F. Dimock,* 77 Fed. 226; *The Mobile,* 147 Fed. 882; *The Lucille,* 169 Fed. 719; *Alaska S.S. Co.* v. *Inland Nav. Co.,* 211 Fed. 840; *The Iron Master,* 1 Swabey (1859) Admiralty Reports, 441; *The Clyde,* 1 Swabey Admiralty Reports, 23 (1856); *Shipping Controller* v. *Lloyd Royal Belge Ltd.,* 1 L. R. 231, 389; K. B. D. Com. Court Nov. 10, 1919; *Harries* v. *Shipping Controller* (May 14, 1918), 14 Asp. Mar. Cas. 320; *Harmonides* (1903) Prob. Div. 1; *The Winkfield* (1902) P. B. 42; 9 Asp. 259 (July 23, 1903); *Roscoe on Damages in Marine*

Collisions, 2nd Edition, 1920, page 166; *Marsden's Collision at Sea,* 7th Edition, page 119.

Our contention on behalf of the Petitioner throughout has been, and is, that no one method of valuation may be followed exclusively, but that all the circumstances bearing on the value of the *Proteus* to the Respondents (particularly in its aspect as a *loss*) must be considered as relevant in arriving at an amount which would fulfill the requirements of the doctrine of *"restitutio in integrum"*. Dr. Lushington's statement in the case of *The Iron Master,* Swab. 443, is pertinent here:

> "In addition to testimony of this description (opinion of persons familiar with the vessel), many other circumstances may be called in aid, *as the original price of the vessel,* the amount of repairs done her, *the sum at which she was insured,* and other circumstances of a similar nature." (Italics ours).

That case was quoted with approval in the case of *The Colorado* decided in the lower court by Judge Longyear, Brown Adm. 411, Fed. Cas. No. 3029, and affirmed by this Court in 91 U. S. 692; also in the English case of *The Harmonides* (1903) Prob. Div. 1. See also *The Minnesota Rate Cases,* 230 U. S. 433, in which this Court announced *"all relevant facts"* must be taken in consideration in arriving at property values.

In reaching his conclusions, the Commissioner stated:

> "I do not feel called upon to find an exact replacement value or a particular method of depreciation" * * * or, "to adopt any particular

> theory under which, by means of mathematical calculations, a final figure would be produced * * *."
>
> * * * "I can do no more than find that sum which, after a consideration of the whole case in the light of all of its facts and circumstances, would seem to be sufficient to compensate the claimant for its loss * * *."

Citing *The Utopia* (Judge Brown) 16 Fed. 507, p. 510; *Record,* p. 190.

Judge Mack also stated in his opinion on the exceptions to the Commissioner's Report:

> * * *"If evidence is adduced, indicating that the market price is not fair under the circumstances, then all other relevant facts should likewise be considered in determining fair value, unless indeed some positive form for ascertaining value is established by legislation. Cf. the rate regulation cases; *Minnesota Rate Cases,* 230 U. S. 352, 434."
>
> *"All the relevant facts should be considered."* (Italics ours.) *Record,* p. 193; 285 Fed. 617, pp. 619-620.

This seems to be the only fair way to approach the question, that is, by considering it from all angles, in view of the circumstances.

Indeed, the "reproduction and depreciation" method applied by the Circuit Court of Appeals for the Second Circuit, to the obvious exclusion of other relevant testimony bearing on the measure of the loss of the *Proteus,* is contrary to analogous cases decided in other circuits, as is indicated by the following cases: *The H. F. Dimock*

(C. C. A. 1st Cir., 1896) 77 Fed. Rep. 226; *La Normandie* (C. C. A. 2nd Cir., 1893) 58 Fed. Rep. 427; *Whitehurst* v. *United States* (C. C. A. 4th Cir., 1921), 272 Fed. Rep. 46; *The J. E. Trudeau* (C. C. A. 5th Cir., 1893) 54 Fed. Rep. 907; *The Samson* (C. C. A. 9th Cir., 1914) 217 Fed. Rep. 344; 208 Fed. Rep. 347; *The I. C. White* (C. C. A. 4th Cir., 1924) 295 Fed. 593.

The Circuit Court of Appeals for the First Circuit, in the case of *The H. F. Dimock, supra,* discredited the exclusive application of the rule of cost of reproduction, p. 234, and laid down the rule that all relevant facts should be considered, p. 236.

The Circuit Court of Appeals for the Second Circuit, in the case of *La Normandie, supra,* although holding that "there is no hard and fast rule", proceeded on the foregoing principles as applied in the First Circuit; whereas in the instant case, *The Proteus,* the same court adopted the narrower ruling of reproduction cost.

The Circuit Court of Appeals for the Fourth Circuit, in *Whitehurst* v. *United States, supra,* used the original cost of the commodity as the basis of the measure of damage.

The Circuit Court of Appeals for the Fifth Circuit, in the case of *The J. E. Trudeau, supra,* while apparently favoring the production theory, with a fixed proportion of one-third off new for old, accepted the ruling of the District Court based on original cost, with an annual depreciation for age. P. 912.

The Circuit Court of Appeals for the Ninth Circuit, in the case of *The Samson, supra,* applied the rule of original cost less depreciation for age; and although there was evidence that reproduction cost had increased materially between the time of construction and the loss of the vessel, 208 Fed. 347, p. 352, the reproduction rule later adopted in the instant case in the Second Circuit was disregarded in the Ninth Circuit.

The Circuit Court of Appeals of the Fourth Circuit declined to accept the reproduction and depreciation method as the sole test of value of a vessel totally lost in collision, and reversed the Commissioner and the District Court which had adopted that method. *The I. C. White,* 295 Fed. 593. The Court stated, at page 597:

> "* * * The cost of replacement is a factor to be used in checking up the other testimony; but *it should not have been given the principal weight, much less should it have been treated as controlling.*"
>
> "*In reaching our own conclusion, we have sought to keep all the evidence in mind.* * * *"
>
> (Italics ours.)

The District Court, in that case, in affirming the Commissioner's findings, had taken an estimated reproduction cost at the time of loss, and depreciated that amount by ten per centum (10%), for the period of a year and eight months of the age of the vessel, arriving at a value of about $98,500.

The Circuit Court of Appeals reduced that valuation to $66,000, by considering evidence of sales of other vessels, *and other relevant facts bearing on values.*

The so-called "rate making" cases are somewhat analogous, in so far as a "fair value" is sought as the basis of fixing a reasonable rate for public utilities.

In the earlier case of *Smyth* v. *Ames* (1898) 169 U. S. 466, it was held by this Court: "* * * the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the *fair value* of the property being used by it for the convenience of the public." P. 546. In approaching a determination of what would be a "fair value" for the property in question, the Court enumerated several factors to be taken into account "in order to ascertain that value". Among these several factors was the "cost of construction". It was suggested that there might be other factors but that these were merely different kinds of evidence to be given such weight as they might deserve. In other words, the Court in that case had applied the same reasoning as was later applied in the *Minnesota Rate Cases, supra,* to the effect that all relevant facts must be considered in the ascertainment of the fair value of property.

In the case of *Galveston Electric Co.* vs. *City of Galveston,* the matter involved was the fare to be paid to insure a reasonable return on the investment, and the basic value of the property was considered. The Master to whom the matter was referred found that the low fare in dispute was confiscatory; but the District Judge dismissed the bill seeking an injunction against enforcement of the fare and "found a much smaller base value" than the Master had advised. This Court, in reviewing the decision of the District Judge which it affirmed,

April, 1922, 258 U. S. 388, while it discussed the reproduction and depreciation method, indicated by its decision disapproval of the application of transitory values as a basis in determining the real value of the property.

Also, in *The Minnesota Rate Cases,* 230 U. S. 352, in ascertaining property values for arriving at just compensation, this Court stated at page 434: "The ascertainment of that value is not controlled by artificial rules. *It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts.* * * * " (Italics ours.)

In the case of *Georgia Railway & Power Co.* vs. *Railroad Commission of Georgia* (June 1923) 262 U. S. 625, this Court noticed that the Commission had "refused to adopt reproduction cost as the measure of value", as to which the Court remarked:

> "The refusal of the Commission and the lower court to hold that, for rate making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation, was clearly correct. * * *"

And that it was sufficient that the Commission had given careful consideration to replacement and had made an allowance to represent appreciation in value.

The cost of reproduction may be "of service in ascertaining the present value of a plant, but it is not conclusive", as was said in the *Minnesota Rate Cases, supra,* 230 U. S. 352; and the same reasoning is as properly applicable to ascertainment of the value of the *Proteus*

in the present case, as it is to determination of the present value of property for rate making purposes.

The same broad rule for ascertainment of value for which we contend in the present case, is also applied in condemnation proceedings.

This Court reviewed a decision of the Circuit Court of Appeals for the Fifth Circuit, on questions of value arising from condemnation proceedings, in the case of *Albert Hanson Lumber Co., Ltd.* vs. *United States* (April 1923) 261 U. S. 581.

The lower courts had awarded the sum of $65,000 as compensation to the owner, 227 Fed. 894. The owner then claimed error in the amount of the award. It seems that there was evidence of original cost, and of "present" cost, and of a resolution of the owner to enter into a contract of sale.

This Court stated at page 589:

> "The evidence tended to show that the original cost of the canal was $65,000, and that it would cost $152,000 to reproduce it. There was evidence disclosing the size of the canal, and its suitability for use, together with the condition of the property. It cannot be said that the verdict of $65,000 is without support. Erie R. R. Co. *vs.* Winter, 143 U. S. 60, 75."

The lower court had instructed the jury "to consider what it did cost and what it would cost now to build the canal, the reasons that induced the company to make the contract, and in reaching a verdict they were not bound by the $65,000 agreed upon and might find an amount

greater or less than that." The charge to that effect was held to be proper by this Court.

The inference from that decision is that "reproduction" cost was not a controlling factor, and apparently was not given as much weight as the original cost, in arriving at a fair value of the property.

In the case of *United States* v. *New River Collieries* (May, 1923) 262 U. S. 341, certain coal was requisitioned by the Government, and the question involved was as to the compensation to be paid the owner. The Lower Court had excluded evidence offered by the United States to show cost of production of the coal and a reasonable profit, it having been contended that a "market price" could not be properly fixed. This Court approved the exclusion of that evidence (cost of production plus reasonable profit) because it was held that such evidence did not prove the market price or a fair value.

This Court recently held in the case of *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106, 123-124, which was reviewed by the Court from the Court of Claims, that the contract had been requisitioned as well as the material constituting the vessel. The contract to build had been entered into on March 28, 1916, for date of delivery on February 1, 1918. The vessel had been requisitioned during August, 1917, and a claimant had been awarded an amount in "just compensation" on January 23, 1920, which was substantially the contract price of the vessel after accounting for certain changes.

In discussing the measure of damage, this Court stated at Page 125:

> "This Court has held in many cases that replacement cost is to be considered in the ascertain-

> ment of value, but that it is not necessarily the sole measure of or guide to value. We are of opinion that value, so far as material, rather than replacement cost should be taken into account, for the ascertainment of just compensation. * * *"*

The Court then enumerated a number of factors which should be taken into account in determining the value of a vessel at the time of the taking; but, it is clear from the Court's statement quoted above, that it did not approve the test of replacement cost as the sole criterion of value.

In a condemnation proceeding in the United States Circuit Court of Appeals for the First Circuit, entitled *United States* v. *Boston C. C. & N. Y. Canal Co.*, 271 Fed. 877, the question before the Court was the amount to be paid the owner of a canal in condemnation proceedings brought by the United States. A jury returned a verdict fixing the amount, and the United States procured a writ of error in respect of admission of certain testimony, among other errors assigned.

The Appellate Court found that the Lower Court should have passed upon the preliminary question of fact or submitted it to a jury with instructions that "they should not consider the evidence of reconstruction cost upon the question of value, unless they were satisfied that a reasonably prudent man would purchase or under-

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* Incidentally, it is interesting to note that the Court of Claims found that at the time of the requisitioning (August 1917) the value of such ships was $200. per deadweight ton, and that the same value pertained on February 1, 1918. An application of that valuation to the deadweight tonnage of the *Proteus*, taken as 3850, would give her value as $770,000; but, that amount would be the valuation of a new vessel, whereas the *Proteus* was 18 years old.

take the construction of the property at such a figure".

It was stated by the Court, at Page 888:

> "It is in substance conceded that reproduction cost is competent evidence of market value, provided the prices existing at the time of reproduction are normal, making due allowance for the period of time necessary to reconstruct the property."
>
> • • • • • •
>
> "While it is customary to admit evidence of reproduction cost bearing upon the question of value, the rule seems to be subject to certain limitations. In the Minnesota Rate Cases, 230 U. S. 352, 452, • • • Mr. Justice Hughes, speaking on this subject, said:
>
> > "The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it should not justify the acceptance of results which depend upon mere conjecture.'"

The foregoing cases certainly do not support a valuation by the reproduction and depreciation method exclusively, nor do they give any greater weight to that element in ascertainment of value than they give to all other facts adduced by the evidence and bearing on the measure of the loss to the owner. Many of the cases, in fact, go further and reject "reproduction" values, particularly, where, as in the present case, those reproduction values are founded on transitory and abnormal costs of production.

The case of *Mersey Docks and Harbor Board and the Lord Commissioners of the Admiralty*, (1920) 3 K. B. Div. 223, which is cited and quoted by the Circuit Court of Appeals, *Record*, page 229, is exceptional and distinguishable, because that case was one where the owner of the lost vessel actually replaced the vessel by new construction at the time. The cost of that replacement was, therefore, a definite monetary loss. Here, the owner did not make any effort whatever to replace the *Proteus*, either by purchase or by reconstruction.

It appears from the statement of facts accepted by the court, in *Mersey Dock and Admiralty Commissioners*, 3 K. B. 223, page 227, that the Harbor Board had been forced to replace the barge which had been requisitioned by The Admiralty, and that the Board had paid for the barge a specific amount which it recovered as a measure of its loss.

The following is quoted from the findings of fact of the special case, stated by an arbitrator, preceding Lord Reading's opinion, and which facts the court had taken into consideration at page 227:

> "* * * The condition of the Port of Liverpool at the date of the requisition and at all material times afterwards was such that it was the duty of the Board to replace the barge as soon as possible, and accordingly at the earliest possible date, namely, in February, 1919, the Board obtained estimates for that purpose. The lowest estimate was that of the original builders, who offered to duplicate No. 798 for 63,000 pounds with a provision for increase or decrease in the event of increase or decrease in the cost of materials or

labor during the construction. The Board, reasonably and properly accepted the builders' offer, and on May 7, 1919, a formal contract to replace the barge as per the original specification and plans upon the terms of the offer was entered into. Wages have risen during the construction under this contract, and for the purposes of this case, it may be taken that the amount which the Board will have to pay the builders will not be less than £70,000. I further find that the barge cannot be completed before the spring of 1920."

The Board claimed the difference between £22,750, the contract price of No. 798, and the price they will have to pay for the barge now being built to replace her.

> "In these circumstances the Board claimed from the Admiralty the difference between £22,750, the contract price of No. 798 and the price they will have to pay for the barge now being built to replace her, and they further claimed £28,770 for the loss of service of the barge for the three years which will have elapsed between the date when the barge No. 798 would have been completed and available if she had not been taken by the Admiralty and the date when she will be replaced by the barge now building." Pages 227-228.

The original contract for the barge was dated December 4, 1914, for delivery on or before October 1, 1915. Owing to certain delays, the barge did not approach completion until February 8, 1917, and the Admiralty requisitioned the barge in her then state, and later, on August 7, 1917, notice was given that the Admiralty purposed purchasing the barge from the builders.

The amount of compensation was left to an arbitrator whose decision was made in the form of a "special case".

After reciting the findings of fact, the opinion of the court was requested on the amount of compensation.

The court decided that the Board was entitled to the amount of money required to replace, that is, the difference between the contract price and the cost of replacing her; but, that the Board was not further entitled to compensation for loss of use during the period of three years between the date when the original barge would have been completed and turned over to the Board, and the date when the barge which the Board built to replace the original barge, was delivered to the Board.

That case has been discussed at length, to show that it is distinguishable from the present case and cannot be taken as an authority to establish "reproduction cost" as the sole factor in arriving at a measure of the loss, as it seems to have been accepted by the Circuit Court of Appeals.

VI. Abnormal and transitory values should not control, even where market value is the test. There is all the more reason why they should not apply under the circumstances here.

Bearing in mind that this loss occurred during August, 1918, and that the Railroad Administration did not surrender control of railroad properties, including floating equipment, until March 1, 1920, and in view of the fact that the *Proteus* was not replaced, there does not seem to be any good reason why the respondents should now

maintain that a highly transitory valuation of August, 1918, should be exclusively applied in their favor.

The District Judge pointed out that:

> "• • • While the market price may be the fairest test of the value of standard commodities commonly bought and sold, when the normal conditions of free competition have full play, this test obviously fails not only if there is no market but when the conditions which make the test a proper one do not obtain. • • •"
>
> • • • • • •
>
> "While, as above stated, under normal conditions the market price of standard commodities might be taken as the exclusive test of value, it is fair value under the circumstances, rather than market price, which is the ultimate criterion. • • •" *Record*, p. 193.

It is immaterial whether the test is the "reproduction" cost or whether it is "market value"; the courts are in accord that fair value is not that derived from a transitory market, or a market which is not free, but the value must at least approximate the normal.

Mr. Justice Holmes in *City of New York* vs. *Sage*, 239 U. S. 57, 61, stated:

> "• • • But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser *in fair market conditions* would have given for it in fact— • • •" (Italics ours.)

To the same effect are the other rate making cases cited previously; also, the case of *Reno Co.* vs. *Public*

Service Commission, 298 Fed. 790, 793; 300 Fed. 645, 654, where the Court discussed reproduction cost in ascertainment of "fair value", but held that it was not *the* controlling factor, stating in 300 Fed. at page 654:

> "It is significant that, in practically every statement of this rule, value is qualified by the adjectives fair or reasonable. Neither original cost, reproduction cost, reproduction cost less depreciation, market value of the stock and bonds, or any other single circumstance is necessarily controlling or equivalent to reasonable value."
>
> "* * * In times when prices and the value of money and property are stable, it is frequently the best and most reliable index of reasonable present value; but in times of abnormally high or unusually low prices, a condition which in its nature must be temporary, the then reproduction cost would be unjust. * * *"

That statement applies as forcibly to the valuation of a vessel lost under the circumstances here, as it does to ascertainment of fair value for any other purposes.

The New York rule in regard to fair market value, is based on the presupposition of a *voluntary* purchase in an open market, *In re Inwood Hill Park,* 189 N. Y. S., 642, where the Court stated as follows, at page 645:

> "* * * What the owner is entitled to is the value of the property taken, and that is what it is fairly believed a purchaser in fair market conditions would have given for it in fact—what a purchaser who is not compelled to buy would pay under ordinary circumstances to a seller who is

not compelled to sell. People *ex rel.* Brown *v.* Purdy, 186 App. Div. 54, 57, 173 N. Y. Supp. 782, affirmed 226 N. Y. 635, 123 N. E. 883. * * *"

The Massachusetts rule is similar, as announced in *Lawrence* vs. *Boston,* 119 Mass. 126, 128, where the following instructions to the jury were approved:

"* * * 'Market value' means the fair value of the property, as between one who wants to purchase and one who wants to sell any article, *not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; nor its speculative value; not a value obtained from the necessities of another.*" (Italics ours.)

So also is the ruling laid down in the Illinois decisions of *Brown* v. *Calumet River Railway Co.,* 125 Ill. 600, 606, and *Lanquist* v. *City of Chicago,* 200 Ill. 69, 73. In the former case, the approved instruction to the jury was:

"Not to consider the price which the property would sell for *under special or extraordinary circumstances,* but its fair cash market value if sold in the market under ordinary circumstances * * *";

and in the latter, the Court stated:

"The rule, that permits proof of other sales in order to show value, requires that such sales *should be made in a free and open market, and where a fair opportunity for competition exists.*"

The tendency to reject abnormal war prices, and to seek a normal cost of materials and production by aver-

aging prices for a period of normal years is indicated in Public Utility Reports Anno. 1918 C. page 248, where under the headnote "Annotation of Valuation" appears the following statement:

> "Ascertainment of reproduction cost.—the reproduction value of a utility plant based upon prevailing abnormal high prices of labor and materials should not be regarded in arriving at the value of the plant for rate making. Re Light, Fuel & P. Co. (W. Va.) Case Nos. 554, 555, Dec. 1, 1917."

The averaging of prices is also prescribed in the *Railway Control Act of March 21, 1918,* Pub. No. 167, 65th Congress, which provides payment for carriers taken over, (as) "just compensation an annual sum * * * not exceeding a sum equivalent as nearly as may be to its annual average operating railway income for the three years ending June 30, 1917."

Also, the United States Shipping Act of September 7, 1916, 39 Stat. 728, Sec. 10, suggests valuation under *normal* conditions:

> "Thereafter, upon ascertainment by agreement or otherwise, the United States shall pay the person interested *the fair actual value based upon normal conditions* at the time of the taking of the interest of such person." (Italics ours.)

Although the object of fixing the then value of the properties involved in the foregoing citations may be to ascertain a fair compensation as a return on the property, or loss of use of the property, or loss of the prop-

erty; the same general principles should be applied to the present case, whether the valuation of the *Proteus* is reached by a "reproduction theory", or by a consideration of all factors as we contend; and they only emphasize the fallacy and unfairness of a theory based on a reproduction figure representing a highly transitory and inflated value as of a particular date (August 1918).

VII. THE FACT THAT THE *Proteus* WAS A REQUISITIONED VESSEL, AND THAT HER OWNER WAS DEPRIVED NOT ONLY OF THE POWER TO DISPOSE OF HER BY SALE, BUT OF THE RIGHT TO HER USE, AT LEAST UNTIL AFTER MARCH 1, 1920, WAS AN IMPORTANT FACTOR IN MEASURING THE DAMAGE SUSTAINED AT THE TIME OF HER LOSS, AND ONE WHICH THE CIRCUIT COURT OF APPEALS PLAINLY DISREGARDED.

The Circuit Court of Appeals in its opinion commented on the fact that the *Proteus* was under requisition at the time of her loss, but it stated:

> "* * * * The act of requisition was at an end and the loss that of the owner" (referring to the sinking of the *Proteus* on the particular date). "At that time, if the owner was free to sell her, there was a ready market. * * *" *Record*, p. 229.

The Court's meaning is not quite clear when it states that the act of requisition was at an end by reason of the sinking and loss of the *Proteus*. The statement is literally true, of course, but it is also true that the *Proteus* no longer existed as a useable vessel, as she became from that moment a total loss. It is difficult to comprehend

how the value of the *Proteus* could have been increased by reason of the fact that she became a total loss, for the requisition certainly did not terminate until she was a total loss, and did not have any further value as a vessel.

The courts have recognized that vessels requisitioned because of war conditions suffered thereby a decrease in value to their owners. *The Kia Ora,* 246 Fed. 143; *Harries* vs. *Shipping Controller,* 14 Asp. Mar. C. 320; *Shipping Controller* vs. *Lloyds Royal Belge,* 1 L. L. R. 231, 389 (1919).

In *The Kia Ora,* Judge Waddill drew a distinction between the value of a vessel while operating freely (unrestrained by requisition), and her value while under requisition for war purposes, stating, at page 144:

> "* * * Her value at the time of stranding, under requisition for war purposes, was $1,772,620; if not under requisition, at existing rates, her value would be about $3,000,000. * * *"

These values refer to a date as of February 24, 1917.

Similarly, in the case of *Harries* vs. *Shipping Controller,* the value free from requisition was stated at £44,500, while it was placed as low as £28,500 while under requisition.

The reason for loss in value to the owner because of the requisitioning is obvious; the owner no longer has domain over his property. As is stated in 23 A. & E. Enc. Law, 261: "In its proper use the term 'property' applies only to the rights of the owner in the thing possessed."

The Court indicated in *Braceville Coal Co.* vs. *People,* (1893) 147 Ill. 66, p. 71, that property in its broader sense is not the physical thing, but is the right of dominion possessed and power of disposition of it.

Also, Mr. Justice Holmes' statement in *International News Service* vs. *Associated Press,* 248 U. S. 215, page 246, is to the same effect, that property does not arise from value, although exchangeable, but it depends upon exclusion by law from interference.

Here, the Southern Pacific Company, not having the right of user, held title to a piece of property which cannot be said to have been as valuable as if it had been free.

The Commissioner properly took into consideration the fact that the *Proteus* was under requisition, and that this condition detracted from her value at the time of her loss. He stated:

> "In addition to this I think the claimant has erred in failing to give effect to the fact that at the time of the loss the ship was under requisition. It is, of course, entitled to be put, to the fullest extent possible, in the same position pecuniarily that it would have been in if the loss had not occurred, but what is that position? At the time of the loss the claimant was not only unable to sell the ship but was barred by law from using or disposing of her in any way. It had no control over her at all and had she not been lost would have received only what the Government would have paid for her use until such time as she would have been returned. * * *." *Record,* p. 184.

Also, the District Court held that:

> "* * * The *Proteus* was under requisition, and the ascertainment of her value must be predicated on that fact. * * *." *Record*, p. 193.

As has been pointed out, the Circuit Court of Appeals disregarded this factor entirely in arriving at its valuation of the *Proteus*.

VIII. THE ORIGINAL COST OF THE *Proteus*, WHICH WAS LESS THAN HALF OF THE AMOUNT AWARDED BY THE CIRCUIT COURT OF APPEALS AS MEASURING HER VALUE AT THE TIME OF THE LOSS, WAS ENTIRELY DISREGARDED AS A FACTOR IN ASCERTAINMENT OF THE MEASURE OF THE DAMAGE.

The cost of the building of the *Proteus* in 1900 (18 years before her loss) was $540,440, as has been stated previously. In 1909, she had been reboilered and repaired at a cost of $90,000; but, that was nine (9) years before her loss, and if her original boilers lasted only nine years in the first part of her life (until 1909), she must have been nearly due for reboilering at the time of her loss in 1918. The total amount of her owner's investment in the *Proteus* was, therefore, about $630,000. But this investment had been earning profits for eighteen (18) years, and those profits were presumably such as to cover not only a fair return on the capital invested, but to include an allowance for depreciation due to her

age of eighteen years, as the original investment would sooner or later become entirely absorbed at the end of the commercial life of the *Proteus*.

If this figure representing the total investment ($630,000) is compared with the figure which the Circuit Court of Appeals awarded ($1,225,000), it is seen that the owners would receive under the decision of the Circuit Court of Appeals the large sum of $575,000 in excess of what they paid for the *Proteus* originally, including betterments. That Court stated:

> "* * * The valuation fixed for the *Proteus* as of August 1, 1918, is at twice her original cost, whereas the valuation fixed by the witnesses called by the petitioner is about one-fifth to one-sixth more than her original cost. * * *." *Record*, p. 230.

That comparison, instead of supporting the high valuation, and excusing it, emphasizes the reasonableness of the petitioner's contention. Under the latter, appreciation is allowed in full. Under the former, the allowance for appreciation seems obviously excessive.

If the rule adopted by the Circuit Court of Appeals of the Ninth Circuit in the case of *The Samson*, 208 Fed. 347, and (1914) 217 Fed. 344, of original cost less depreciation for age should be applied to the present case, the value of the *Proteus* would have been found to be less than half the amount fixed by the Circuit Court of Appeals of the Second Circuit here. See also *Hanson Co.* vs. *United States* (1923) 261 U. S. 581, referred to previously.

IX. THE "BOOK VALUE" PLACED ON THE *Proteus* BY HER OWNER, THE SOUTHERN PACIFIC COMPANY, SUPPORTS OUR CONTENTION THAT THE MEASURE OF LOSS NOW SOUGHT IS ENTIRELY EXCESSIVE. THIS FACTOR WAS NOT MENTIONED AND PROBABLY NOT CONSIDERED BY THE CIRCUIT COURT OF APPEALS.

The Southern Pacific Company was carrying the steamship *Proteus* on its books at a value of $224,986.49 as of August 19, 1918, the date of her loss. *Record*, p. 189.

It seems that the practice of that company was to depreciate the values of vessels by seventy-five (75) per cent of cost during the first twenty (20) years of use. Assuming that the company while depreciating the value for age had not adequately appreciated the value for the increase in cost of material and labor between 1900 and 1918, nevertheless, if the factor three should be used as representing that increase (none of the witnesses set a higher factor of increase than three), then the appreciated value would be about $675,000. That is a little more than half of the award made by the Circuit Court of Appeals.

It is somewhat inconsistent that with a considered "book value" in the amount stated, the owner should seek to recover nearly six-fold that value, as the measure of the damage.

X. THE *Proteus* WAS OF A SPECIAL TYPE OF CONSTRUCTION, WHICH WOULD HAVE OPERATED TO REDUCE HER SALE VALUE IN AN OPEN MARKET. THAT FACT WAS DISREGARDED BY THE CIRCUIT COURT OF APPEALS.

The *Proteus* was a combined freight and passenger coastal steamer, of 4,836 gross tons, and a deadweight capacity of 3800 tons, with 4,000 horse power, and a speed of about fifteen knots, according to the statement made by counsel. *Record*, p. 59.

One of the witnesses produced on behalf of the petitioner, Mr. Swasey, who was thoroughly familiar with the *Proteus*, having been employed at the works of the builder during the time that the *Proteus* was under construction, described in detail the special features of the *Proteus*, which militated against general use. *Record*, pp. 110 to 115.

Perhaps the most pertinent fact brought out by Mr. Swasey resulted from his comparison of the *Proteus* with an ordinary cargo carrying vessel of the same gross tonnage. Such a cargo carrier (4836 *gross* tons) would carry about 7,000 tons *deadweight;* whereas, the *Proteus* could carry only 3800 to 3830 tons deadweight. *Record*, pp. 59, 132. The respondent's witness, Mr. Palen, testified that the *Proteus* could carry only 2778 tons of cargo, the balance of the deadweight capacity being taken up by water, fuel and stores. *Record*, p. 132.

That comparison is particularly important because the demand for vessels during this period was for sea-

going cargo carriers, and not for coastal combined passenger and cargo carriers. This demand was reflected in the method then in use of gauging the value of a vessel by her "deadweight tonnage", that is, by her carrying capacity. Thus if $220 a deadweight ton, which was a figure used by one of the witnesses whose testimony has been cited previously, may be taken as a unit value, the ordinary cargo carrying, seagoing vessel, of the same *gross* tonnage of the *Proteus*, would have a value of $1,540,000, viz., 7000 x $220 (without considering the amount to be taken off for age); whereas, the *Proteus* with her 3800 tons of deadweight capacity would be worth only $736,000. The latter figure approximates the amount awarded by the Commissioner and confirmed by the District Court; but, it is $489,000 less than the amount awarded by the Circuit Court of Appeals, as the measure of the damage. If the lower *cargo* carrying capacity of 2778 tons should be the test of value, the *Proteus* would be worth only $611,160 (2778 x $220).

There were other features of special construction described by this witness, such as the formation of the deck and upper hull, whereby, as he said: "her strength, therefore, her freeboard, was very low, up to her solid deck." *Record*, p. 110.

Still other defects were her system of hatches, and the peculiar construction of her keel as compared with the ordinary cargo carrying vessel; also, the absence of double bottoms in the *Proteus*, which militated against her strength and usefulness. *Record*, p. 111.

The remarks of Circuit Judge Rose, in delivering the opinion in the case of *The I. C. White,* 295 Fed. 593, at page 595, are pertinent:

> "The market value yardstick cannot be applied to a ship of so peculiar construction that, while it profitably serves some need of its owner, nobody else has occasion for it. If it were offered for sale, it would very probably bring little more than its junk value."

It is suggested that this special construction and type of the *Proteus,* as explicitly described and illustrated by Mr. Swasey, must have a direct bearing on that vessel's value. This evidence, however, does not seem to have been given any weight at all by the Circuit Court of Appeals in arriving at its high valuation under the reproduction theory.

XI. Evidence bearing on insured value of the *Proteus* supports the fairness of the amount awarded by the Commissioner and confirmed by the District Court.

The evidence shows that vessels of the *Proteus* class, if not the *Proteus,* had been insured under hull and disbursement insurance first in the sum of $600,000 and then increased to $690,000 at about the time the Railroad Administration assumed control of that vessel. *Record,* pp. 163, 164. Two months after the loss of the *Proteus,* that figure ($690,000) had been taken as a valuation for

war risk insurance on the sister ship of the *Proteus*, named the *Comus*, and identical to the *Proteus*. *Record*, pp. 150, 153, 162 and 165.

The *Comus* was an exact duplicate of the *Proteus* in construction, age and service, and it may fairly be assumed that the two vessels were of equal value to their owner. *Record*, 121, 135, 136.

Although there was testimony that the officials of the Railroad Administration did not arrive at an agreement with the representatives of the Southern Pacific Company concerning this valuation for insurance purposes, yet that amount was placed in the war risk insurance from the existing policies of hull and disbursements, by conference among certain Railroad Administration officials, then serving as such, who had formerly been connected solely with the coastal lines. Among these officials was the Manager of the Southern Pacific Company's Atlantic fleet, of which the *Proteus* was a unit, and he must be presumed to know the valuation placed by the Southern Pacific Company on the *Proteus*. *Record*, pp. 45, 46. It is certainly not unlikely that there would be an under-valuation by these interested parties at this critical time, for insurance purposes.

It has been held that among the elements which may be considered in arriving at vessel values, "the sum at which she was insured" is relevant. *The Ironmaster*, 1 Swabey (1859), Adm. Reports 441, cited by Judge Longyear to that effect in the case of *The Colorado*, Brown Adm. 411, Fed. Cas. No. 3029, affirmed by this Court in 91 U. S. 692. The evidence adduced in the record bearing on insured value is corroborative of the lower valuation of the *Proteus* as found by the Commissioner and confirmed by the District Court.

XII. THE APPLICATION OF THE SCALE OF VALUATION FIXED FOR VESSEL PROPERTY BY THE ADVISORY BOARD OF THE WAR RISK INSURANCE BUREAU AT THE TIME OF HER LOSS, INDICATES THAT THE *Proteus* WAS WORTH LESS THAN $700,000, ACCORDING TO THE ADVISORY BOARD'S SCALE.

A significant development of the inquiry into the insurance placed by the War Risk Bureau is that the "Advisory Board" had formulated a scale to regulate the maximum amounts for covering various classes of vessels, graduated by age; and that by this scale, a maximum insurance that would have been allowed on the *Comus* (or the *Proteus*) would be $175 per deadweight ton, less ten per cent for unclassified vessels. *Record,* pp. 151, 152, 153, 154, 157, 160, 161. The *Comus* and the *Proteus* were not classified. *Record,* p. 46. Under the assumption of 4,000 tons as a deadweight capacity, the maximum presumably for insurance in the War Risk Bureau would be $630,000 on that scale ($175 x 4000 less 10%), *Record,* p. 161. Taking the deadweight capacity of the *Proteus* as about 3,850 tons, the use of that figure in the Advisory Board scale, *Record,* p. 161, would give a *maximum* to be allowed for insurance purposes the sum of $606,375. It appears that the insurance in the amount stated ($690,000) had been accepted under a special arrangement and before the valuation had been passed upon. *Record,* pp. 150, 153, 164.

Undoubtedly the members of the Advisory Board (the report was signed by two of the recognized experts on valuations of vessels for insurance purposes, namely Hendon Chubb and W. N. Davey), who had formulated the scale for valuation purposes on August 26, 1918 (one week after the loss of the *Proteus*), *Record,* p. 161, had based their figures on the then high valuations of vessels, particularly trans-atlantic cargo carriers and that although they had the interests of the Government in mind, they also so regulated the scale as to afford liberal protection to American shipowners. Appendix No. 3.

The members of this Committee are concededly men with wide knowledge of shipping and shipping values and their formulation of what would be a fair maximum value under insurance for total loss may be taken as a reliable estimate of vessel valuations at the time, albeit at the highest peak of the abnormal conditions prevailing at the time.

The valuation as it works out for *Comus* (and for her sister ship the *Proteus*), accords very nearly with the average of the valuations placed on the *Proteus* by the Petitioner's witnesses, and indicates that about $600,000 would be a fair valuation of the *Proteus* under the conditions of high valuation then prevailing. That result may be said to be the conclusion of the Advisory Board for valuation of a vessel of the size and type of the *Proteus;* as it is derived directly from that Board's table. *Record,* p. 161. Appendix No. 3.

XIII. THE VALUE OF THE PROTEUS AS A "GOING CONCERN" WOULD PROBABLY BE LESS THAN $500,000.

The Commissioner suggested that the cases sanction among other methods of establishing value for total loss, "proof of the value of the vessel as a going concern".

That test is recognized in the English law, namely "what is her value to the owner as a going concern at the time she was lost." *Marsden on Collisions,* 6th Ed., p. 119. *The Harmonides,* 1903 P. D. 1.

Unfortunately, there has not been adduced any tangible evidence on which to make a computation of the vessel's earnings, past or present. It is known that her original cost was $540,440 in 1900; and her usefulness may possibly have extended to 1940, although her services would have been restricted by the requisition until March 1, 1920.

As the *Proteus* represented an investment of $630,000 (first cost plus renewals in 1909) at the time of loss, on which the owners might expect a clear net profit of six per cent (compounded) for each year during a balance of twenty-five years, (until 1943), that expectancy would be equal to a cash payment of $483,197.40, according to the annuity tables for present value of an annuity of twenty-five years, to yield the profit stated. The premise in this calculation is liberal, in that it does not take into account the depreciated value for eighteen years, nor the accrued profits for that period on the original investment.

XIV. THE TESTIMONY AS TO THE VALUE OF THE *Proteus* GIVEN BY THE PETITIONER'S WITNESSES IS PREFERABLE TO THAT OF THE WITNESSES WHO TESTIFIED ON BEHALF OF THE RESPONDENTS.

The three "experts" who testified under the reproduction and depreciation theory on behalf of the *Proteus* interests obtained their excessive results by magnifying the cost of reproduction (they each apparently accepted the $1,750,000 estimated by Mr. Palen without question), and they also misapplied the second important factor of rate of depreciation per year.

That method (reproduction and depreciation) gives a wide latitude for inaccuracies and miscalculations. If the system is to be used, however, the figures should at least fairly represent the factors on which the calculations are to be based. Although the three experts valued the *Proteus* on behalf of the respondents under this theory, and Mr. Martin particularly adopted an empirical formula for that valuation (which was exclusively accepted by the Circuit Court of Appeals), it is apparent from an examination of their testimony, that Messrs. Raymond, Smith and Martin carried many inaccuracies and errors into their calculations, which destroys the exactitude, and even the proximate correctness, of the results. These errors have been commented on particularly in the previous text in respect of application of the rate of depreciation, and Mr. Martin's faulty arithmetic has also been indicated. *Post*, p. 78.

Two of these gentlemen were shipowners, and presumably interested in maintaining high valuations. The third (Mr. Martin) was a professional surveyor.

The high values placed on the *Proteus* by Messrs. Raymond and Smith, is hardly reconcileable with the recommendation which the Association of which these gentlemen are members, made to the Senate Committee on February 9, 1920, for the sale of Shipping Board vessels at $100 a ton. *Record,* p. 68. The date of that recommendation is significant, because the sale value there sought was as of a date *prior* to the date of redelivery of floating equipment which had been controlled by the Railroad Administration. If that valuation may be taken as a test, the *Proteus,* on redelivery to the Southern Pacific Company, if not lost, would have been valued at less than $400,000, or less than a third of the amount which these same witnesses advocated as her value in August, 1918.

The valuations which had been placed on two other vessels, the *Havana* and the *Saratoga,* by a Government "Board of Appraisal", of which two of the petitioner's witnesses had been members (Gillmor and Swasey), were cited as showing the high value at which vessel property was being rated at the time. These two vessels were of an entirely different type to that of the *Proteus,* being very much larger and more modern. The valuation placed on them by the Board of Appraisal was testified to be "entirely consistent with $650,000 for this one" (meaning the *Proteus*). *Record,* p. 99.

At least two of the three witnesses who testified on behalf of the petitioner were entirely disinterested. *Rec-*

ord, pp. 81, 107. It is clear from the text of their testimony that they had given the subject very careful consideration, based on complete knowledge of the *Proteus,* and although they applied the method of reproduction and depreciation, they also took all other relevant factors into consideration in arriving at their valuations, which were as follows

Captain H. G. Gillmor, $650,000, *Record,* p. 187.
A. L. Swasey, $611,000, *Record,* p. 188.
R. W. Morrell (*maximum*) $630,000; (*minimum*) $564,000, *Record,* p. 181.

A mean of these figures would be about $630,000, which is $120,000 less than the figure fixed by the Commissioner and confirmed by the District Court, but it is $595,000 less than the high valuation placed on the *Proteus* by the Circuit Court of Appeals, under the reproduction theory, as applied by that Court.

The Commissioner heard and saw all of these witnesses. His conclusions as to them are expressed in his statement:

> "I must consider all of the opinions, *having in mind the standpoints from which they were given* and all of the facts and circumstances. The result of such consideration is that *the views of the petitioner's witnesses seem to me more nearly in accord with the probabilities in the case at bar than those of claimant's witnesses* but it is difficult to make any satisfactory finding of fact." (Italics ours.) *Record,* p. 190.

The District Court was also impressed by the thoroughness with which the petitioner's witnesses discussed the subject. *Record,* p. 195.

On the other hand, the Circuit Court of Appeals obviously preferred the statements of the witnesses for the respondents, and did not give the testimony of the petitioner's witnesses any weight whatever. *Record,* p. 230.

It is submitted that the opinion of the experienced Commissioner as to the disinterestedness and fitness of the witnesses who appeared before him personally should be accepted,* and preferred to the opinion of the Circuit Court of Appeals, which did not have that advantage.

Davis v. *Schwartz,* 155 U. S. 631 (1895).
Adamson v. *Gilliland,* 242 U. S. 350 (1917).
Mason v. *United States,* 260 U. S. 545 (1923).
Cramer v. *United States,* 261 U. S. 219 (1923).

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* The average of the valuations given by the petitioner's witnesses ($630,000) is a very liberal allowance as compared to the deadweight tonnage valuations fixed by the Government during this period.

The deadweight tonnage of the *Proteus* was stated by the builder to be 3830, and by counsel as 3800. *Record,* pp. 59, 132.

The Court of Claims found the value of *new* tonnage to be $200 per deadweight ton at least up to February, 1918, *ante,* p. 91. At that rate the value of a *new Proteus* would be $766,000 (at 3830 d.w.t.). Depreciation for her age of 18 years at the low rate of 2½% (45% off) would bring her value down to $421,300 ($766,000—$344,700).

The Shipping Board's average value of $175 per deadweight ton for *new* tonnage, *ante,* p. 61, would give the value *new* as $670,250, and depreciation for age would reduce it further.

The Advisory Board's figure of $175 per deadweight ton, Class 5, Appendix No. 111, *post.,* p. 141, would give the same ($670,250); but taking off 10% for non-classification, that figure would be reduced to $603,225. Cf. *ante,* pp. 110-111.

The District Court's award of $750,000 (plus interest) was more than liberal, according to these standards.

XV. THE CONCLUSIONS OF THE TWO RESPONDENTS, SOUTHERN PACIFIC COMPANY AS OWNER, AND THE DIRECTOR GENERAL OF RAILROADS AS DEMISE CHARTERER AND INDEMNIFIER, AS TO THE VALUE OF THE *Proteus* AT THE TIME OF HER LOSS, AND AS EVIDENCED BY THE SETTLEMENT MADE BETWEEN THE TWO PARTIES DISCUSSED UNDER THE FIRST POINT, SHOW CONCLUSIVELY THAT THE VALUATION FIXED BY THE CIRCUIT COURT OF APPEALS IS EXCESSIVE.

The settlement which was made prior to the decision of the Circuit Court of Appeals for the Second Circuit has been discussed at length under the First Point. Reference to that settlement here is made only to show that the Director General of Railroads (through his assistants) carefully investigated the question of value of the *Proteus* to the Southern Pacific Company at the time of the loss of the *Proteus*, and he arrived at a figure which he stated as a lump sum of $885,000 for two vessels, these being the steamship *Proteus* and the lighter *Confidence*. The amount claimed for the *Confidence* was $16,664, so that it is a fair inference that the value of the *Proteus* may be assumed to have been fixed at the sum of $868,336. *Commission*, p. 64.

The figure representing the value of these two vessels was fixed for the purpose of concluding a final adjustment of all the claims which the Southern Pacific Company was making against the Government, and, final

adjustment was made on that basis in a lump sum amount. *Commission,* p. 64.

It further appears that there was not any allowance for the item of "interest" made on this amount, *Commission,* p. 66; so that, the lump sum figure was inclusive of any claim which may have been made for interest. *Commission,* p. 66.

As to the method of arriving at the valuation for the *Proteus,* Director-General Davis testified:

> "A. The Director General and his Staff and also Mr. Wright had knowledge of the allowance made by the United States District Court in this litigation, and that was one of the matters considered in making the adjustment, but I cannot say that it was controlling.
>
> "B. There was a very careful examination, from all available sources, made as to the actual value of the *Proteus* at the time of its loss, and while, as heretofore stated, the finding of the court was one of the items which influenced the result the final result was obtained from all sources of information available to the Director General." *Commission,* p. 66.

The lump sum payment was made (including the amount paid for the steamship *Proteus*) from the Director General of Railroads to the Southern Pacific Company on December 19, 1922. *Commission,* pp. 64, 97.

The elapsed time from the date of loss of the *Proteus,* which was August 19, 1918, to the date of payment for the loss, December 19, 1922, would be four years and four months.

Assuming, for the purposes of comparison of the valuation of the *Proteus* as fixed by the Court below, that interest at the rate of six (6) per cent should be paid on the amount representing the value of the *Proteus* from the date of loss to the date of payment, the item of interest would be twenty-six (26) per cent.

The "lump sum" of $868,336 would include twenty-six per cent interest, therefore; and, if this interest should be segregated from the total (by dividing $868,336 by 126%), the interest item alone would amount to $179,180.45, leaving as the principal the sum of $689,155.55.

The District Court awarded the sum of $750,000, "with interest from the date of the loss"; and, therefore, the decree carries with it interest on the valuation of the *Proteus* from August 19, 1918 until paid.

The interest on the amount awarded by the Commissioner and confirmed by the District Court ($750,000) from the date of the loss to the date of settlement between the Director General of Railroads and the Southern Pacific Company (December 19, 1922) would amount to $195,000, making the total of the principal and interest up to that date (December 19, 1922) the sum of $945,000.

Again, under the award made by the Circuit Court of Appeals ($1,225,000), which also carries interest at six per cent, the item of interest alone from the date of loss to the date of settlement by the Director General of Railroads would amount to $318,500, making the total of principal and interest up to that date (December 19, 1922) $1,543,500.

It will thus be seen that the lump sum payment which the Director General of Railroads made in settlement

with the Southern Pacific Company for loss of the *Proteus* ($868,336) was $76,664 less than the award of the District Court (including interest); and $675,164 less than the valuation fixed by the Circuit Court of Appeals (including interest) as the measure of the loss.

Apart from the legal effect of that settlement as discussed under the First Point herein, the evidence adduced under the commission issued by order of this Court has established a fact which assumes a most important, if not controlling, bearing on the question of value of the *Proteus* as of the date of her loss.

Although the evidence may not be explicit enough to prove that the Southern Pacific Company specifically agreed to the item as allocated by the Director General of Railroads to represent the value of the *Proteus*, it is a fair assumption that the Southern Pacific Company by its acceptance of the lump sum settlement thereby actually agreed on that valuation.

As to the Director General of Railroads, on the other hand, the proof is clear, to the effect that after "very careful examination, from all available sources, made as to the actual value of the *Proteus* at the time of its loss", *Commission*, p. 66, the final result "obtained from all sources of information available to the Director General", was a fixing of a value for the *Proteus* which was in fact less than the value placed on that vessel by the Commissioner and the District Court.

The value thus fixed is so out of all proportion to the value as fixed by the Circuit Court of Appeals as to make it obvious that the latter is unreasonable.

It is submitted that in any event the maximum value that may now fairly be placed on the *Proteus* is the amount which the Director General paid the Southern Pacific Company and which the latter received in full satisfaction, namely, $689,155.55, plus interest from August 19, 1918, the date of loss; or the sum of $868,336, plus interest from December 19, 1922 until paid.

LAST POINT.

THIS COURT SHOULD REVERSE THE DECISION OF THE CIRCUIT COURT OF APPEALS AS TO THE VALUATION OF THE *Proteus*, AND SHOULD AFFIRM THE DECREE OF THE DISTRICT COURT.

Respectfully submitted,

WILLIAM H. MCGRANN
JOHN M. WOOLSEY
Counsel for Petitioner.

New York City,
January, 1925.

Appendices

Nos. I.—III.

APPENDIX NO. I.

THE STATUTES AND PROCLAMATIONS ESTABLISHING FEDERAL CONTROL OF RAILROADS.

APPENDIX NO. I.

The Statutes and Proclamations Establishing Federal Control of Railroads.

The "*Act making appropriations for the support of the army for the fiscal year ending June 30, 1917, and for other purposes*" contained among others the following provisions:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."
>
> 39 U. S. Statutes at Large, 645.

On December 26, 1917, under this authority the President issued a proclamation taking over possession and control of rail and water transportation systems in the United States,

> "From and after twelve o'clock on said twenty-eighth day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director without further act or notice. But for the purpose of accounting said possession and control shall date from twelve o'clock midnight on December 31, 1917."
>
> 40 U. S. Statutes at Large, 1735.

The President's proclamation appointed a Director General of Railroads and the seizure was stated to be without prejudice to the rights of the owners of railroads and others having interest in them, to have just compensation for their use by the Government.

Proclamation of December 26, 1917.

The subsequent Act of March 21, 1918, entitled "*An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners and for other purposes*", commonly known as the Federal Control Act authorized the President to make agreements with the railroads as to the basis of their operation and compensation to be paid to them therefor, conferred further powers on the President, and provided for the eventual termination of Federal control at some date not exceeding one year and nine months next following the date of the proclamations of peace by the President.

40 U. S. Statutes at Large, 451.

Both by the President's proclamation of December 26, 1917, and by Section 10 of the Federal Control Act, no process, mesne or final, could be levied against any railroad property under the Federal control.

Thus proceedings *in rem* against vessels in possession of the Director General of Railroads were forbidden.

By General Order No. 60 of the orders of the Director General of Railroads, suits arising from the operation of a railroad or its auxilliary fleet were to be brought against him by name.

APPENDIX NO. II.

RELEVANT PORTIONS OF AGREEMENT OF FEBRUARY 19, 1919, BETWEEN SOUTHERN PACIFIC COMPANY AND ITS SUBSIDIARIES AND THE DIRECTOR GENERAL OF RAILROADS.

APPENDIX NO. II.

Relevant Portions of Agreement of February 19, 1919, Between Southern Pacific Company and The Director General of Railroads.

The relevant provisions of the agreement of February 19, 1919, between the Director General and the Southern Pacific Company, which is printed in full as Exhibit 1 to Mr. Kruttschnitt's testimony, *Commission*, pp. 9-36, and as Exhibit A to Mr. Davis' testimony, *Commission*, pp. 68-96, are as follows:

> "(d) Wherever in this agreement the words 'Federal control' are used to indicate a period of time, they shall be understood as meaning the period from 12 o'clock midnight of December 31, 1917, to and including the day and hour on which said control shall cease.
>
> "(j) 'Railway', 'railway property', 'railway operation,' 'railway revenue and expenses', wherever used in this agreement shall, unless from the context a contrary intent plainly appears, be deemed to include the water lines or water craft of any of the Companies whose system of transportation includes water lines or water craft."
>
> *Commission, Agreement,* Sec. 1, *Subdivisions* d and j, p. 14.
>
> "Section 2—Property Taken Over.
>
> "Sec. 2. The railroads and systems of transportation of the Company and of its said Affiliated Companies of which the President has taken over possession, use, control, and operation shall be considered as including:

"(a) The following roads and properties:

"1. The combined rail and water system of transportation of the Southern Pacific Company, consisting of railroads, steamships and other water craft, * * *"

"Also the ocean steamships owned and operated by the Southern Pacific Company under the name of Southern Pacific Co.—Atlantic Steamship Lines—Morgan Line, and under the name of Southern Pacific Co.—Atlantic Steamship Lines—Havana Line, described as follows:

"Passenger and freight steamers, Chalmette, Comus, Creole, Excelsior, Momus, *Proteus;** freight steamers, El Alba, El Almirante, El Capitan, El Cid, El Dia, El Mar, El Monte, El Mundo, El Norte, El Occidente, El Oriente, El Paso, El Rio, El Siglo, El Sol, El Sud, El Valle, oil tank steamers Topila, and Torres; tugs El Amigo, El Chico, El Rey; steam barges Manhattan and Despatch; and sixty barges operated in connection therewith, including all rights in and to the use of wharves, docks, and water front terminals used in connection with the operations of said fleet at New York, New York, Galveston, Texas, New Orleans, La., and Havana, Cuba; and all other equipment and appurtenances commonly used upon or operated as a part of the Company's system of water transportation between the port of New York, and the port of Galveston, between the port of New York and the port of New Orleans, and between the port of New Orleans and the port of Havana, Cuba."

Commission, Agreement, Sec. 2, *Subdivisions* a, p. 15.

"(a) The Companies accept all the terms and conditions of the Federal control act and any regulation or order made by or through the President under authority of said act or of that portion of the act approved August 29, 1916, referred to in paragraph (a) of the preamble to this agreement which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation; and they further and expressly accept the covenants and obligations of the Director General in this agreement set out and the rights arising thereunder in full adjustment, settlement, satisfaction and discharge of any and all claims and rights, *at law or in equity,* which they or any of them now have or hereafter can have, otherwise than under this agreement, against the United States, the President, the Director General, of any agent or agency thereof, for compensation under the Constitution and laws of the United States for the taking possession of their property, and for the use, control, and operation thereof during Federal control, and for any and all loss and damage to their business or traffic by reason of the diversion thereof or otherwise which has been or may be caused by said taking or by said possession, use, control, and operation."

Commission, Agreement, Sec. 3, *Subdivision* a, p. 18.

"(i) The Director General shall pay, or save the Companies harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during Federal control, except the expenses which under this agreement are to be borne by the Companies. He shall also pay or save the Companies harmless

from all rents called in the monthly reports to the Commission equipment rents or joint-facility rents, and all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon, the Companies by reason of any cause of action arising out of Federal control, or of anything done or omitted in the possession, operation, use, or control of the companies' property during Federal control, except judgments or decrees founded on obligations of the Companies to the Director General or the United States."

Commission, p. 24.

"(k) In carrying out the provisions of paragraphs (a), (b), (c) and (d) of this section and the provisions of section 6 hereof the Director General shall not settle any claim by or against the Companies against the objection in writing of the president or of any other duly authorized officer of the Companies. The conduct of all litigation before any court or commission arising out of such disputed claims, or out of operation prior to Federal control, shall be in charge of the Director General's legal force and the expense thereof shall be paid by the Director General; but the Companies may, at their own expense, employ special counsel in connection with any such litigation.

"(l) Nothing in this agreement shall be construed as inconsistent with the provision in section 10 of the Federal control act that no process, mesne or final, shall be levied against any property under Federal control, nor as a waiver by the United States of any claim that might otherwise be made by it that the rights of any State or

subdivision thereof or of any individual or corporation have been abrogated or suspended by the taking over of the Companies' property or by Federal control."

Commission, Agreement, Sec. 3, *Subdivisions* i, k and l, pp. 23, 24.

"(e) If during Federal control any of the property, other than floating equipment, described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged otherwise than by fire or public enemies, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement, or said value or damages, as the case may be, shall be charged to annual railway operating expenses; it being understood that extraordinary losses caused by floods, explosions, train wrecks or accident are included in the matters covered by this paragraph, while ordinary losses due to such causes are included in the matters covered by paragraph (a) of this section; Provided, however, that if the Commission on application of the Director General or the Company and after giving due consideration to the practice of the Companies during the test period in respect to such matters and to any other pertinent facts and circumstances, determines that it is just and reasonable that the said cost or value shall be apportioned or extended over a period of more than one year, this shall be done, and so much of said cost or value as may be apportioned by the Commission, over the period subsequent to Fed-

eral control, shall be charged to the Companies in the final accounting at the end of Federal control and shall be paid by them.

"If, during Federal control, any of the property described in paragraph (a) of section 2 hereof or any replacement thereof or addition thereto or betterment or extension thereof is destroyed or damaged by fire or marine casualty; or any of the floating equipment described in paragraph (a) of section 2 hereof is destroyed or damaged by war risks while in ocean waters outside of the three mile limit, and is not restored or replaced by the Director General, he shall reimburse the Companies the value of the property destroyed or the amount of the damage at the time of the loss; and the cost of restoration or replacement or said *said* value or damage, as the case may be, shall be charged to annual railway operating expenses, but the same shall not be considered a charge to such expenses for the purposes specified in paragraph (a) of this section."

"In case of any such loss or damage by fire, or marine casualty, the Director General shall, if given written notice of the requirements of any mortgages, equipment lease, or trust on the property so destroyed or damaged, make such restoration or replacement, or pay such value or damage, in such way as to meet the requirements of such mortgage, equipment lease, or trust in the same manner as would have been proper in applying the proceeds of insurance on such property if it had been insured by the Companies against loss or damage in accordance with the terms of such instruments of lien; and a compliance with the

written request of the Company in respect thereof shall be a full acquittance of any obligation of the Director General in the premises."

"The words 'marine casualty' are used herein as applying to floating equipment and as meaning casualties, covered by the usual marine insurance policy, including collision clause, and losses or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosion, bursting of boilers or breakage of shafts or through carrying explosives."

* * * * * *

"The Director General shall not be liable to the Companies for any loss or damage due to the acts of public enemies, except as provided in this paragraph (e) as to floating equipment.

"(h) * * *

"Some of the steamships enumerated in paragraph (a) of Section 2 hereof, having been on January 1, 1918, under charter to different departments of the United States Government the Company hereby subrogates the Director General to all its rights and obligations under any and all such charter-parties, all charter hire, however, accruing under any of the same for the period prior to January 1, 1918, to be paid to the Company; and the Director General shall enforce the rights of the Company including the right, if any, to have such steamships returned by the charterer in as good order and condition as when received."

Commission, Agreement, Sec. 5, *Subdivisions* e and h, pp. 26, 27, 28.

"Sec. 9. (a) At the end of Federal control all the property described in paragraph (a) of section 2 hereof *shall be returned* to the Companies, together with all repairs, renewals, additions, betterments, replacements, and road extensions thereto which have been made during Federal control, *except as any part thereof may have been destroyed or retired and not replaced, in which case the provisions of section 5 hereof shall govern* and except that the Director General shall not be obliged, otherwise than as provided in paragraph (1) of said section 5, to restore or replace property destroyed or damaged by the acts of public enemies." (Italics ours.)

* * * * * *

"(f) After Federal control no claim by or against the Director General shall be settled by the Companies against the written objection of the Director General or the Attorney General of the United States. The conduct of all litigation before any court or commission arising out of such disputed claims or out of operations during Federal control shall be in charge of the Companies' legal force and the expense thereof shall be paid by the Companies; but the Director General or the Attorney General may, at the expense of the United States, employ special counsel in connection with any such litigation."

Commission, Agreement, Sec. 9, *Subdivisions* a and f, pp. 33-34.

APPENDIX NO. III.

STEAMER VALUATIONS.

APPENDIX No. III.

Steamer Valuations.

(Steel & Iron)

(Classed 1 in American Records or 100 A 1 in Lloyds Register)

American, Neutral and Japanese

Cargo Steamers—A 1 Steel:

Class 1—Not over 1 yr. old per deadweight ton..	$200
Class 2—Over 2 and not over 5 yrs. old per deadweight ton	195
Class 3—5 to 10 years old per deadweight ton.....	190
Class 4—Over 10 years and not over 15 per deadweight ton	180
Class 5—Over 15 years and not over 20 per deadweight ton	175
Class 6—Over 20 years and not over 25 per deadweight ton	160
Class 7—Over 25 years per deadweight ton.....	150

Tank Steamers:

Class 1—Not over 1 yr. old per deadweight ton..	250
Class 2—Over 2 and not over 5 yrs. old per deadweight ton	240
Class 3—5 to 10 years old per deadweight ton....	230

Class 4—Over 10 years and not over 15 per deadweight ton 210

Class 5—Over 15 years and not over 20 per deadweight ton 187.50

Class 6—Over 20 years and not over 25 per deadweight ton 165

Class 7—Over 25 years per deadweight ton..... 150

British, French, Italian and Greek ⅓ off the above amounts.

10% off if not classed.

In the case of a steamer being rebuilt or furnished with new boilers, 60% of the cost of the improvements or betterments to be added to the value as of the year the expenditure is made. This does not apply to expense of ordinary repairs or upkeep.

Deduct 20% on wooden steamers.

In the case of steamers of foreign friendly flags, if charterer be an American citizen or corporation under terms which require the charterer to furnish War Risk Insurance, in the event of the charter party providing the amount of war insurance, which must be furnished by the charterers, the Bureau can write policies up to such an amount.

Recommended by:

(Signed) Hendon Chubb, W. N. Davey,
Advisory Board.

To William C. Delanoy, Director Bureau of War Risk Insurance, Washington, D. C.

APPENDIX NO. IV.

STEVENSON-TAYLOR DEPRECIATION TABLE.

DEPRECIATION TABLE

REMAINDERS AFTER DEDUCTING DEPRECIATION UNIT OF VALUE, 1000

BASED ON VESSELS HAVING BEEN WELL CARED FOR—SPECIAL DEPRECIATION OR APPRECIATION DEPENDING ON CONDITIONS

Age Years	Steel Steamers Salt Water Service	Wood Steamers Salt Water Service	Motor Boats		Steel Steamers Fresh Water Service	
			Hulls, etc.	Engines		
1	989	980	975	950	995	
2	975	955	930	888	985	
3	957	926	860	808	970	
4	931	888	790	700	951	
5	900	848	720	550	930	
6	864	810	650	300	906	
7	822	770	580	150	879	
8	779	730	510	70	852	
9	739	690	440	25	826	
10	700	652	370	0	800	
11	665	612	300		773	
12	635	575	240		749	
13	603	538	190		724	
14	570	501	148		700	
15	540	465	110		675	
16	511	430	84		650	
17	481	395	62		627	
18	452	361	44		604	
19	425	330	30		578	
20	400	301	10		555	
21	377	272			530	
22	354	247			506	
23	331	222			482	
24	310	200			459	
25	289	180			435	
26	266	161			413	
27	245	146			390	
28	226	131			368	
29	205	117			346	
30	185	105			325	
31	165				305	
32	145				284	
33	127				264	
34	109				245	
35	90				228	
36	71				210	
37	52				192	
38	36				177	
39	18				163	
40	0				150	